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Sup. Ct.

TRANSCRIPT OF RECORD

(Pages 1 to 70)

Supreme Court of the United States

OCTOBER TERM, 1946

47

No. 3466

SILESIAN AMERICAN CORPORATION, DEBTOR,
AND SILESIAN HOLDING COMPANY, PETI-
TIONERS,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AS SUC-
CESSOR TO THE ALIEN PROPERTY CUSTO-
DIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1946.

CERTIORARI GRANTED FEBRUARY 17, 1947.

INDEX

PAGE

Statement Under Rule 13	1
Order to Show Cause for Instructions	3
Petition in Support of Order to Show Cause	5
Exhibit A to Petition	14
Exhibit B to Petition	16
Affidavit of Leon Finley, Sworn to July 20, 1945	17
Exhibits to Affidavit of Leon Finley	24
Affidavit Supplementing Petition by Thomas A. McGrath	30
Exhibit A to Affidavit of Thomas A. McGrath	34
Order Appointing Trustees	34
Excerpt from Trustee's Statement	40
Letter of Leon Finley dated August 21, 1945 Transmitting Documents	43
Letter of La Roche & Co. dated August 4, 1945 ...	44
Affidavit of Eduard Schulte	45
Declaration of Union Bank of Switzerland	47
Affidavit of Erzag Limited	47
Affidavit of La Roche & Co.	48
Opinion of the Court, dated September 25, 1945	49
Order Appealed From dated October 30, 1945	50
Notice of Appeal	52
Assignment of Errors (Statement of Points)	54
Designation of Contents of Record	58
Stipulation as to the Record	60
Clerk's Certificate	62
Proceedings in U. S. C. C. A., Second Circuit	63
Opinion, Hand, J.	63
Judgment	69
Clerk's certificate (omitted in printing)	69
	70

United States Circuit Court of Appeals 1.
FOR THE SECOND CIRCUIT

IN THE MATTER

of

SILESIAN-AMERICAN CORPORATION,

Debtor.

Statement Under Rule 13

The Debtor commenced this proceeding by filing its petition for reorganization under Chapter X of the Bankruptcy Act on July 29th, 1941. The name of the original party was Silesian-American Corporation, Debtor.

By order of the District Court for the Southern District of New York dated July 30th, 1941, Francis X. Conway and E. O. Sowerwine, were appointed trustee and additional trustee of the Debtor respectively.

The Securities and Exchange Commission appeared herein, through notice of appearance filed by its attorney, on August 1st, 1941. 3

By order of the United States District Court for the Southern District of New York dated August 8th, 1941 the Guaranty Trust Company of New York as indenture trustee of the Debtor's outstanding bonds, was designated as a person to receive notice of all matters arising in this proceeding.

By order of the United States District Court for the Southern District of New York dated August 11th, 1941, Silesian Holding Company, as holder of more than a

4

Statement Under Rule 13

majority of the outstanding shares of the Debtor, was designated as a person to receive notice of all matters arising in this proceeding.

By undated order of the United States District Court for the Southern District of New York, entered October 1st, 1942, Max Winkler, Felix M. Lopez and Edward W. Smith, as a Bondholders' Protective Committee were designated as persons to receive notice of all matters arising in this proceeding.

- 5 On April 3rd, 1945 the Alien Property Custodian appeared herein by the United States District Attorney for the Southern District of New York.

No formal notice of appearance has been filed nor motion to intervene made on behalf of Union Bank of Switzerland, La Roche & Co., Banque Cantonale de Berne, and Aktiengesellschaft Leu & Co. (the several of whom are frequently referred to as the "Swiss Banks"), but Leon Finley, Esq., as attorney for the said banks, was served with a copy of the order to show cause on which the order appealed from was entered, and Mr. Finley appeared on behalf of the said Swiss Banks at the argument of the motion and filed papers in respect thereto, and the Court recognized such appearances.

- 6 The order appealed from, dated October 30th, 1945, and entered October 31st, 1945, was made by Hon. John W. Clancy as the result of a motion by the Debtor for instructions, which motion was brought on by an order to show cause dated April 5th, 1943, and after numerous adjournments came on for hearing June 26th, 1945.

Notices of appeal were filed November 3rd, 1945, by the Debtor and also by the Silesian Holding Company.

Order to Show Cause for Instructions
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

✓ SILESIAN-AMERICAN CORPORATION,

Debtor.

In Proceedings for the Reorganization of a Corporation.
No. 79,205.

Upon the annexed petition of Silesian-American Corporation, the above-named Debtor, verified the 31 day of March, 1943, and sufficient reason appearing to me therefor; it is

ORDERED that Francis X. Conway, as Trustee; E. O. Sowerwine, as additional Trustee; Silesian Holding Company; Securities & Exchange Commission; Max Winkler, Felix M. Lopez and Edward W. Smith, as Bondholders Protective Committee; Leon Finley, as Attorney for Union Bank of Switzerland, La Roche & Company, Banque Cantonale de Berne and Aktiengesellschaft Leu & Company; Leo T. Crowley, Alien Property Custodian; the Tax Commission of the State of New York; Guaranty Trust Company of New York, as Indenture Trustee and as Transfer Agent for the Debtor; and the Bank of the Manhattan Company, as Registrar of the Debtor's securities, show cause before me in Room 506, United States Courthouse, Foley Square, New York City, New York, on the 12th day of May, 1943, at 10:30 o'clock in the forenoon of the day, or as soon thereafter as counsel can be heard, why this

Order to Show Cause for Instructions

- 10 Court should not judicially determine the effect of the demand of the Alien Property Custodian, dated February 12, 1943, that the Debtor cancel on its books the outstanding certificates for fifty thousand shares of its Preferred Stock, of the par value of \$100.00 per share, and ninety-eight thousand shares of its Common Stock without par value, referred to in Vesting Order No. 370, and issue in lieu thereof new certificates in the name of the Alien Property Custodian, and why the Court should not issue its instructions to the Debtor with respect thereto, and why this
- 11 Court should not grant such other, further and different relief as is just and proper; and it is

- FURTHER ORDERED that service of a copy of this Order and the Petition upon which it is made upon Goldwater & Flynn, Attorneys for Francis X. Conway, as Trustee, and E. O. Sowerwine, as additional Trustee of Silesian-American Corporation, Debtor; upon Davis, Polk, Wardwell, Gardiner & Reed, as Attorneys for Guaranty Trust Company of New York, as Indenture Trustee; upon Chadbourne, Wallace, Parké & Whiteside, as Attorneys for Silesian Holding Company; upon J. Anthony Panneck, as Attorney for Securities & Exchange Commission; upon
- 12 Messrs. Schribner & Miller, as Attorneys for the Bondholders Protective Committee; upon Leon Finley, as Attorney for Stockholders and Creditors; upon Leo T. Crowley, Alien Property Custodian; upon the Tax Commission of the State of New York; and upon the Bank of the Manhattan Company, and the Guaranty Trust Company of New York, as Registrar and Transfer Agent, respectively, of the Debtor's securities, on or before the 12 day of April, 1943, shall be deemed as good and sufficient service hereof.

Dated New York, N. Y., 5 day of April, 1943.

(sgd) JOHN W. CLANCY,
U. S. D. J.

Petition in Support of Order to Show Cause**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

In Proceedings for the Reorganization of a Corporation.**No. 79,205.**

*To the Hon. John W. Clancy, Judge of the District Court
of the United States for the Southern District of New
York:*

The petition of Silesian-American Corporation, the Debtor, respectfully shows as follows:

1. Your petitioner is the Debtor in this proceeding for reorganization under Chapter X of the Bankruptcy Act. Francis X. Conway, Esq. and E. O. Sowerwine have been duly appointed, respectively as Trustee and as additional Trustee for the purposes specified in Section 189 of the Bankruptcy Act, and have duly qualified and are acting as such.

2. The capital stock of the Debtor consists of 120,000 shares of 7% Cumulative Preferred Stock of the par value of \$100.00 each, in the aggregate par value of \$12,000,000, all of which is issued and outstanding, and 200,000 shares of Common Stock without par value, but having a stated value of \$1,000,000, all of which is issued and outstanding.

3. Fifty-one per cent of the Common stock and fifty-eight and one-third per cent of the Preferred Stock of the Debtor is held by Silesian Holding Company, a Delaware

16

Petition in Support of Order to Show Cause

Corporation. The remaining stock of the Debtor (forty-nine per cent of its Common Stock, and forty-one and two-thirds per cent of its Preferred Stock) is owned, according to the Debtor's books and records, by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland (hereinafter referred to as the "Non Ferrum Company").

17

4. Said Non Ferrum Company is a Swiss Corporation which appears on the "Proclaimed List of Certain Blocked Nationals Promulgated Pursuant to Proclamation No. 2497 of the President of the United States of July 17, 1941, Revision 1, February 7, 1942," and it has been found by the Alien Property Custodian that said shares of stock of the Debtor are held by said Non Ferrum Company for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben—a German corporation—and that said shares are property of, and represent an interest in, a business enterprise which is a national of a designated enemy country (Germany).

18

5. On or about January 18, 1943, there was served upon the Debtor a copy of Vesting Order No. 370, reciting that it vested in Leo T. Crowley, Esq., the Alien Property Custodian, all of said fifty thousand shares of Preferred Stock, and ninety-eight thousand shares of Common Stock of the Debtor, as appears more fully from a copy of said Vesting Order annexed hereto, marked Exhibit "A", and hereby made a part hereof.

6. Upon information and belief, said Vesting Order No. 370 was issued by the Alien Property Custodian pursuant to the terms and provisions of the First War Powers Act, 1941 (50 U. S. C., §616) amending subdivision (b) of

Petition in Support of Order to Show Cause

19

Section 5 of the Trading with the Enemy Act of October 6, 1917.

7. Upon information and belief, the certificates of the Debtor for said shares of stock are not in the physical possession of said Leo T. Crowley, Alien Property Custodian, but were, prior to the making of said Vesting Order No. 370, and many years prior to August 31, 1939, pledged with the following named banks in Switzerland, hereinafter referred to as the "Swiss Banks," as collateral security for loans made by them aggregating several millions of dollars, the exact amount being unknown to the debtor: 20

Union Bank of Switzerland
LaRoche & Company
Banque Cantonale de Berne
Aktiengesellschaft Leu & Company

8. The exact nature and extent of the property rights and interest of said Swiss Banks in and to said shares of stock prior to the making of said Vesting Order No. 370, or subsequent thereto, is unknown to the Debtor, and the Debtor does not know whether said Swiss Banks have foreclosed their lien on said securities. 21

9. Said Swiss Banks do not appear on the said "Proclaimed List of Certain Blocked Nationals Promulgated Pursuant to Proclamation No. 2497 of the President of the United States of July 17, 1941, Revision 1, February 7, 1942," nor has any order been served on the Debtor by the Alien Property Custodian vesting, or purporting to vest, in the Alien Property Custodian any property rights or interest of said Swiss Banks in any of said shares of stock.

10. On or about February 12, 1943, the Alien Property Custodian demanded that the Debtor cancel on its books

22

Petition in Support of Order to Show Cause

the outstanding certificates for said fifty thousand shares of Preferred Stock and Ninety-eight thousand shares of Common Stock, and issue in lieu thereof its certificates in the name of "Alien Property Custodian, Washington, D. C., Account No. 28-1722," as appears more fully from a copy of said demand annexed hereto, marked Exhibit "B", and hereby made a part hereof.

23

11. Your petitioner is in doubt as to whether it should comply with said demand for the following reasons, among others:

(a) The First War Powers Act, 1941, provides, in part, that "any property or interest of any foreign country or national thereof shall vest . . .," as directed therein. There is no provision in the First War Powers Act, 1941, however, providing for the issuance to the Alien Property Custodian of certificates representing shares of stock which have been vested pursuant to the provisions above quoted of said First War Powers Act, 1941. Nor has there been any finding pursuant to said First War Powers Act pursuant to which any property rights of said Swiss Banks in said shares of stock could or would vest in the Alien Property Custodian.

24

The Trading with the Enemy Act of 1917 contains a provision in Section 7(c) thereof as follows:

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its,

Petition in Support of Order to Show Cause

25

his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require." 26

Section 7 of the Trading with the Enemy Act refers only to property owned either by "an enemy or ally of enemy." It contains no reference to property owned by nationals of countries, such as Switzerland, which are not at war with the United States or are not allies of countries which are at war with the United States, and nationals of such countries are not included in the definitions of "enemy" and "ally of enemy" in Section 2 of the Trading with the Enemy Act of 1917.

There is doubt, therefore, as to the authority of the Alien Property Custodian to direct the issuance of such certificates, as is requested by said demand made upon the Debtor, Exhibit "B", annexed hereto. 27

(b) Further, there is doubt as to the extent to which the Trading with the Enemy Act of 1917 is still in force and effect, and, more particularly, whether said Section 7(c) thereof is still in effect. Said Act contains numerous references to the 1917-1918 period, from which it may be argued that, by its terms, it applied only to that period. See for example, references to "the present war" in Sec-

28 *Petition in Support of Order to Show Cause*

tion 3(d) and Section 4(b). It contains similar provisions referring to the status in 1917 of property of enemies or allies of enemies. For example, Section 7, which is the section containing the above-quoted provision with respect to transfers of enemy-owned shares of stock, refers, in subparagraph (a) to shares of stock "owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy." The shares of stock here involved were not so owned in 1917, for the Debtor was not organized until 1926.

29 Recently, on February 12, 1943, Judge Bondy held, in *Draeger Shipping Co., Inc. v. Crowley*, 11 L. W. 2626-7, that by reason of the circumstance that Congress in the First War Powers Act, 1941, provided, by its express language, that it amends the first sentence of subdivision (b) of Section 5 of the Trading with the Enemy Act "It, therefore, must be assumed that Congress intended that all the provisions of the Trading with the Enemy Act of 1917 as amended shall be held applicable to this amendment *so far as this consistently can be done.*"

30 The Debtor, in making any transfer of said stock pursuant to the demand of the Alien Property Custodian, would be protected only (1) if Section 7 of said Act is in full force and effect, (2) if said subparagraph (c) thereof applies to transfers under the circumstances here presented, and (3) the demand of the Alien Property Custodian for such transfer is validly issued pursuant to the provisions thereof.

By reason of the facts above stated, the Debtor is in doubt as to whether these conditions have been met, and whether, therefore, it should comply with said demand because of the consequent risk of incurring liabilities therefor.

Petition in Support of Order to Show Cause

31

(c) The Debtor's Registrar, The Bank of the Manhattan Company, and its stock Transfer Agent, the Guaranty Trust Company of New York, are both located within the State of New York, and any certificates issued pursuant to the demand of the Alien Property Custodian would be issued in New York. The tax law of the State of New York imposes a tax upon all stock transfers, and Section 270 thereof provides that "it shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the [tax] stamps and pay the tax provided by this article." The Alien Property Custodian, in his demand, Exhibit "B", makes no tender of cancelled tax stamps of the State of New York, and the tax law of the State of New York contains no provision exempting such transfers from taxation. The Debtor, and its said Registrar and Transfer Agent, are, therefore, in doubt as to the legality of any transfer made pursuant to such demand and as to their right to make such transfer without proof of due payment of the New York State stock transfer taxes thereon. 32

(d) The United States Internal Revenue Code, in 26 U. S. C., Sec. 1802(c), subdivision 7, purports to exempt from federal taxes, transfers or stock such as this proposed transfer, but contains an apparent error in its wording. The subdivision exempts from federal stock transfer tax, any transfer "from a foreign country or national thereof to the United States or any agency thereof . . . directed pursuant to the authority vested in the President by Section 5(b) of the Trading with the Enemy Act (40 Stat. 415) as amended by the First War Powers Act (55 Stat. 838)." The reference in the statute to 55 Stat. 838 apparently represents an 33

34

Petition in Support of Order to Show Cause

erroneous attempt to refer to the First War Powers Act, although the reference actually is a reference to the Presidential Proclamation issued pursuant to the First War Powers Act.

35

12. For the reasons above stated, the Debtor respectfully requests that the Court issue its instructions to the Debtor as to whether, or upon what condition, the Debtor should comply with said demand, and determine the validity of said demand, and whether the Debtor would be protected from any and all claims by any parties, including said Swiss Banks, by reason of compliance with said demand.

13. The following have appeared in this proceeding:

Goldwater & Flynn, Attorneys for Francis X. Conway, as Trustee, and E. O. Sowerwine, as additional Trustee of Silesian-American Corporation, Debtor, 60 East 42nd Street, New York, N. Y.

Davis, Poik, Wardwell, Gardiner & Reed, Attorneys for Guaranty Trust Company of New York as Indenture Trustee, 15 Broad Street, New York, N. Y.

36

Chadbourne, Wallace, Parke & Whiteside, Attorneys for Silesian Holding Company, 25 Broadway, New York, N. Y.

J. Anthony Pannuck, Attorney for Securities & Exchange Commission, 120 Broadway, New York, N. Y.

Schribner & Miller, Attorneys for Bondholders Protective Committee, 40 Wall Street, New York, N. Y.

14. Leon Finley, 521 Fifth Avenue, New York, N. Y., appears herein as "Attorney for stockholders and credi-

Petition in Support of Order to Show Cause

37

tors," but has filed no formal notice of appearance. Upon information, and belief, said Leon Finley appears for, among others, the Swiss Banks above mentioned, and is, therefore, a person interested in this application, as is Leo T. Crowley, Alien Property Custodian, 120 Broadway, New York, N. Y., the Tax Commission of the State of New York, 80 Center Street, New York, N. Y., and the Bank of the Manhattan Company, 40 Wall Street, New York, N. Y., and Guaranty Trust Company of New York, 140 Broadway, New York, N. Y., the Debtor's Registrar and Transfer Agent, respectively. All of these, together with those who have appeared herein, should receive notice of this application. No other person has been designated to receive notice generally herein or with respect to this matter.

38

15. No previous application has been made for the relief requested herein.

Wherefore, your petitioner, the Debtor, prays that an order issue herein directing the above-named to show cause why this Court should not determine the validity of said demand of the Alien Property Custodian that the Debtor issue said certificates, and instruct the Debtor with respect thereto, and why the Court should not grant such other, further and different relief as may be just and proper.

39

SILESIAN-AMERICAN CORPORATION,
Debtor.

By (s) **ROBERT E. DWYER**

(s) **THOMAS A. McGRATH,**

Thomas A. McGrath,
Attorney for Debtor,
Office and Post Office Address,
25 Broadway, New York, N. Y.

(Verification by Robert E. Dwyer as Vice-President of Debtor, sworn to March 31, 1943.)

40

Exhibit A to Petition**OFFICE OF ALIEN PROPERTY CUSTODIAN****WASHINGTON****VESTING ORDER NUMBER 370**

Re: 41.67% of the preferred stock and 49% of the common stock of Silesian-American Corporation

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation,
 41 finding that the property described as follows:

50,000 shares of 7% cumulative non-voting preferred stock and 98,000 shares of common stock (which constitute substantial parts, namely, 41.67% and 49%, respectively, of all outstanding shares of preferred and common stock) of Silesian-American Corporation, a Delaware corporation, New York, New York, which is a business enterprise within the United States, owned by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, and held for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben, a German corporation,

42

is property of, and represents an interest in said business enterprise which is, a national of a designated enemy country (Germany), and determining that to the extent that any or all of such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of the aforesaid designated enemy country, and having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it neces-

Exhibit A to Petition

43

sary in the national interest, hereby vests such property in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return should be made or such compensation should be paid.

44

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national", "designated enemy country" and "business enterprise within the United States" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

45

Executed at Washington, D. C. on November 17, 1942.

(Signed) LEO T. CROWLEY

LEO T. CROWLEY

Alien Property Custodian

(OFFICIAL SEAL)

CERTIFIED TO BE A TRUE
COPY OF THE ORIGINAL.

FRANCIS A. MAHONEY

FRANCIS A. MAHONEY, Secretary
OFFICE OF ALIEN PROPERTY CUSTODIAN

46

Exhibit B to Petition**OFFICE OF****ALIEN PROPERTY CUSTODIAN
WASHINGTON****February 12, 1943**

**Silesian-American Corporation
25 Broadway
New York, New York**

Attention of Secretary47 **Gentlemen:**

Reference is made to Vesting Order No. 370 executed by the Alien Property Custodian on November 17, 1942 vesting in himself as Alien Property Custodian 50,000 shares of 7% cumulative non-voting preferred stock and 98,000 shares of common stock of Silesian-American Corporation owned by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, and held for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben.

48 A copy of Vesting Order No. 370 was served January 18, 1943 on Mr. E. O. Sowerwine, Secretary and Treasurer of your corporation by Mr. Francis J. Carmody, an authorized representative of the Alien Property Custodian.

You are hereby authorized and directed to cancel on the books of Silesian-American Corporation the outstanding certificates for 50,000 shares of 7% cumulative non-voting preferred stock and 98,000 shares of common stock, as above referred to, and issue in lieu thereof new certificates in the name of the "Alien Property Custodian, Washington, D. C., Account No. 28-1722."

Affidavit of Leon Finley, Sworn to July 20, 1945

49

The new certificates are to be delivered against receipt to the Federal Reserve Bank of New York, Safe-keeping Department, for the account of the Alien Property Custodian.

Please report to this office the serial numbers of the cancelled certificates and the names in which they were inscribed. It is also requested that we be advised whether the cancelled certificates have been surrendered to the corporation for retirement or if they are still outstanding.

Kindly advise this office of your action in the matter.

50

Very truly yours,

(sgd:) FRANCIS J. McNAMARA

FRANCIS J. McNAMARA
Assistant to the Alien Property Custodian

Affidavit of Leon Finley, Sworn to July 20, 1945

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

51

[SAME TITLE]

In proceedings for the reorganization of a Corporation.
No. 79,205.

STATE OF NEW YORK,

CITY AND COUNTY OF NEW YORK, } ss.:

LEON FINLEY, being duly sworn, deposes and says:

That he is an attorney at law, having his office at 521 Fifth Avenue, in the Borough of Manhattan, City of New York.

52

Affidavit of Leon Finley, Sworn to July 20, 1945

That your deponent is the attorney for the Union Bank of Switzerland, La Roche & Co., Banque Cantonale de Berne, and Aktiengesellschaft Leu & Company, Swiss banking firms, having their offices in Switzerland.

That your deponent is advised and verily believes that his clients are the owners and holders of jointly and own and have the legal title to the 50,000 shares of the 7% cumulative non-voting preferred stock, and the 98,000 shares of the common stock of Silesian-American Corporation, which said shares represent 41.67% of the total issued non-voting preferred stock, and 49% of the total issued common stock of the Silesian-American Corporation.

53

That the Alien Property Custodian did on November 17, 1942 issue vesting order No. 370 by the terms of which, he vested unto himself the said 41.67% of the preferred stock, and 49% of the common stock, which are in fact owned by your deponent's clients as hereinbefore named, and which are not owned as the Alien Property Custodian concluded in his vesting order by "Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle", for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben.

54

That your deponent is advised that both the preferred and common stock of Silesian-American Corporation, to wit, the 50,000 shares of the 7% cumulative non-voting preferred stock, and the 98,000 shares of the common stock, are owned by deponent's clients undisputably. That they have owned the said shares, and that they have been owned by them for many years before the outbreak of the war in Europe, as a result of their creditorship, and their having made large and substantial loans in the early 1930's, which said loans were secured by the said shares of both common and preferred stock; and that they have acquired and now own the said shares of stock for good and valuable consideration. That they have made claim to the said stock, and

Affidavit of Leon Finley, Sworn to July 30, 1945

55

have at all times alleged that the said shares are owned by them bona fidedly, and not for the account of any third person, firm or corporation, direct and/or indirect; and that they and each of them jointly are the true owners of the same.

It is respectfully submitted that the vesting order as issued by the Alien Property Custodian was issued by him without any foundation in fact. There is no question in your deponent's mind from conversations had by your deponent, with the interested parties, and from the hearings that were had before the Treasury Department in 1941, but that the said shares are absolutely and entirely owned by Swiss nationals strictly and only.

56

In any event after Swiss assets were blocked in the United States, it was impossible for your deponent to communicate with his clients because of the fact that the German hordes occupied most of Europe, and there was no communication possible between the United States and Switzerland. Your deponent fully realized in 1942 that it was absolutely necessary and essential to have the physical documentary proof here in the United States in order to firmly and finally establish to the satisfaction of this Court, if needs be, and to the satisfaction of the Alien Property Custodian, if needs be, that there was no foundation for the Alien Property Custodian in issuing the vesting order. However, because of the impossibility of communications and the unavailability of the documents, your deponent advised the trustee in bankruptcy and the Alien Property Custodian personally that the Swiss claimed the title absolutely to the said 50,000 shares of preferred stock, and the 98,000 shares of the common stock notwithstanding the issuance of the vesting order.

57

In view of the adverse claims made of the Corporation by both the Swiss principals and the Alien Property Custodian, and further, because of the demand of the Alien

58

Affidavit of Leon Finley, Sworn to July 20, 1945

Property Custodian, dated February 12, 1943, that the Debtor Corporation (Silesian-American Corporation) cancel on its books the outstanding certificates for the 50,000 shares of the preferred stock, and the 98,000 shares of the common stock owned by the Swiss principals and referred to in Vesting Order No. 370, and to issue in lieu thereof new certificates in the name of the Alien Property Custodian, the Debtor did on April 5, 1943, make the present motion which was originally returnable on May 12, 1943, asking this Court for instructions as to what to do in view of the adverse claims.

59

The said motion has been adjourned during the past two years by the Court on the consent of the interested parties, and at the request of either your deponent in behalf of his clients, and/or by the Trustee in bankruptcy, and/or by the Debtor Corporation. During the past few years, it has been impossible for your deponent because of the unavailability of communications with Switzerland to obtain from his clients the physical documentary proof necessary and required in order to firmly and finally and unequivocally establish that title to the said 50,000 shares of the preferred stock, and the 98,000 shares of the common stock of the Debtor corporation is purely and entirely Swiss owned, and to establish further that the Alien Property Custodian was in error in issuing his vesting order No. 370; that the same was issued without foundation in fact, and to prove beyond any doubt that the Swiss principals are the true bona fide and actual owners of the said 50,000 shares of the preferred stock, and the 98,000 shares of the common stock without any reversionary interest, equitable, legal or otherwise, direct and/or indirect, in any enemy national and/or in any other person, firm or corporation other than themselves, and to further establish that the said shares were acquired by the Swiss purely and entirely with Swiss capital and for their own account.

60

Affidavit of Leon Finley, Sworn to July 20, 1945

61

That limited communications were finally restored with Switzerland late in the year 1944. Your deponent did on December 4, 1944, write to the Union Bank of Switzerland and advise them of the then status of the proceedings, and requested that they forward to your deponent the documentary proof in order to establish title here. A copy of the said letter addressed to Alfred Schaefer, President of the Union Bank of Switzerland, is annexed hereto and made part hereof.

It did apparently take many months for the said letter to reach Switzerland, but it finally arrived. Not receiving any reply up to March, 1945, your deponent thereupon cabled to the Union Bank of Switzerland on March 6, 1945, advising them that your deponent had written on December 4, 1944 and requested absolute proof of title. A copy of the said cable is also annexed hereto and made part hereof. A reply was received on March 10, 1945 in which your deponent was advised that they had only then received deponent's letter of December 4, 1944, and further advised your deponent that the same shall be reverted to in due time.

62

Thereafter and on June 2, 1945, your deponent received a cable from La Roche & Co., one of the group of Swiss principals, in which your deponent was advised that the Swiss were in the course of preparing all the necessary documents, proofs and certifications required in order for your deponent to establish *title in the Swiss*, and that they were doing everything possible to get same into your deponent's hands at the earliest possible moment. A copy of the said cable of June 2, 1945, is also annexed hereto and made part hereof.

63

It is certainly reasonable to assume that a situation such as the one at bar is most complex; it involves many millions of dollars; the Swiss are a neutral people; the physical properties owned by the Silesian-American Corporation

64

Affidavit of Leon Finley, Sworn to July 20, 1945

are located in eastern Germany and Poland, and what policy will be adopted by the German and Polish governments towards foreign stockholders, is certainly not known at this time; and further, the Swiss as neutrals and non-belligerents are entitled to the full protection of the Court in every instance in order to protect their public rights in the pending proceeding before this Court.

It does not seem reasonable that the Swiss creditors, stockholders and principals would make a claim to title which is contrary to the truth.

65

It is therefore respectfully submitted that this Court should protect in every respect the interests and claims of the Swiss creditors in the proceeding before the Court, and should restrain the issuance of any new certificates to the Alien Property Custodian at this time. Further delay will not and cannot impede or damage any person and/or firm interested in the pending proceeding; and the Court should be jealous of the interests of and fully protect the trustees in the pending proceeding.

66

Your deponent in order to fully secure his clients' rights in the matter, did on May 18, 1945, write to Thomas A. McGrath, Esq., of 25 Broadway, New York City, Goldwater & Flynn, Esqs., Attention of Mr. Oliver Cowan, at 60 East 42nd Street, New York City, Chadbourne, Wallace, Parke & Whiteside, Esqs., Attention of Mr. Henry Wolff, at 25 Broadway, New York City, Francis X. Conway, Esq., Trustee for Silesian-American Corporation, at 110 East 42nd Street, New York City, E. O. Sowerwine, Esq., Trustee for Silesian-American Corporation, c/o Anaconda Copper Mining Co., 25 Broadway, New York City, Hon. James B. M. McNally, United States Attorney, Attention of Mr. Lynch, at Foley Square, New York City, and to George Zolotov, Esq., Securities & Exchange Commission, at 120 Broadway, New York City, advising them of the peril under which they would act in the event your deponent's

Affidavit of Leon Finley, Sworn to July 20, 1945

67

clients should suffer any damage in this matter. A copy of said letter dated May 18, 1945, is also annexed hereto and made part hereof.

Your deponent therefore prays this Court that until the entire question of title will be fully and entirely adjudicated between the Alien Property Custodian, your deponent's clients, and the Trustees herein, that nothing should be done or even condoned in this proceeding so that all parties in interest may have their day in Court, and have afforded unto them a full and complete opportunity to establish their rights and interests in the pending reorganization. It should be remembered that the Swiss principals have not unnecessarily delayed any proceedings before this Court, but that they had no control over the lack of facilities for communication and correspondence.

68

WHEREFORE, your deponent respectfully prays that instructions be issued to the Debtor Corporation that no new shares be issued to the Alien Property Custodian representing the 50,000 shares of the 7% cumulative non-voting preferred stock, and the 98,000 shares of the common stock, until the entire question as to who is rightfully entitled to the same shall have been fully, firmly and finally adjudicated by and between the Swiss Creditors and the Alien Property Custodian.

69

(Sworn to by Leon Finley on July 20, 1945.)

70

Exhibit to Affidavit of Leon Finley**COPY**

Class of Service
Desired

Ordinary X

Charge to the account of Mr. Leon Finley, 521 Fifth Avenue, N. Y. City.

71

WESTERN UNION CABLEGRAM**March 6, 1945.**

Alfred Schaefer
President, Union Bank of Switzerland
Barnhofstrasse 32, Zurich, Switzerland

72

WROTE YOU DECEMBER FOURTH REQUESTING ABSOLUTE PROOF OF
TITLE IN SWISS OF THEIR COMMON STOCKHOLDINGS IN SILESIAN-
AMERICAN CORPORATION INFORMATION NECESSARY BY MAY
TWENTY-FIFTH OR EARLIER WHEN CAN SAME BE EXPECTED HERE
CABLE REPLY

LEON FINLEY
521 Fifth Avenue,
New York City.

25

73

Exhibit to Affidavit of Leon Finley

COPY

**R C A
RADIOGRAM**

R. C. A. COMMUNICATIONS, INC.

**Received at 64 Broad Street, New York 4, at Mar 10 1945
Via RCA Fa Standard Time**

HBE CI SZ 5660 ZUERICH 23 9th 1425

74

NLT LEON FINLEY 521 FIFTH AVENUE NEW YORK

**RECEIVED YOURS FOURTH DECEMBER ONLY NOW STOP SHALL
REVERT IN DUE TIME**

ALFRED SCHAEFER BAHNHOFSTRASSE 45

P12

PASS

PASS P49

75

76

Exhibit to Affidavit of Leon Finley**COPY****R C A****RADIOGRAM****R. C. A. COMMUNICATIONS, INC.**

Received at 64 Broad Street, New York 4, at June 2 1945
Via RCA FAW 1039 FA Standard Time

77

NLHBE-SZ1104 BASEL 54 1 1008**NLT LEON FINLEY 521 FIFTH AVENUE NEW YORK CITY**

WE ARE IN THE COURSE OF PREPARING ALL NECESSARY DOCUMENTS PROOFS AND CERTIFICATIONS REQUIRE BY YOUR ESTABLISHING SWISS TITLE DOING EVERYTHING GETTING SAME YOUR HANDS EARLIEST POSSIBLE STOP IF NOT IN YOUR HANDS WHEN MATTER NEXT IN COURT REQUEST FURTHER ADJOURNMENT FOR ABOVE STATED REASON.

LAROCHE COMPANY**PASS C75**

78

Exhibit to Affidavit of Leon Finley**COPY****May 18, 1945**

Thomas A. McGrath, Esq.
25 Broadway,
New York City.

Re: Silesian-American Corporation

Dear Mr. McGrath:

I am in receipt of a letter from Goldwater & Flynn, 80
dated May 8, 1945, and am advised that a copy of this letter
has been sent to you.

In this letter, Goldwater & Flynn has advised all the in-
terested parties that they will be ready to proceed on June
26, 1945, with the motion now pending before the District
Court, for the Southern District of New York, made by the
Debtor Corporation to have the Court judicially determine
the effect of the demand of the Alien Property Custodian,
dated February 12, 1943, pursuant to which demand the
Alien Property Custodian requested that the Debtor Cor-
poration cancel on its books the outstanding certificates for
50,000 shares of its preferred stock of the par value of 81
\$100 per share, and the 98,000 shares of its common stock
without par value, and that the Debtor Corporation issue
to the Alien Property Custodian, new certificates of stock
therefor.

You will please be advised that I, as attorney for La
Roche & Co., Basle, Switzerland, Union Bank of Switzer-
land, Zurich, Switzerland, and the other Swiss banks in
interest, hereby advise you that according to my best
knowledge and information, my clients are the bona fide
owners of the said 50,000 shares of the preferred stock of
the par value of \$100 per share, and 98,000 shares of the
common stock without par value, of Silesian-American

82

Exhibit to Affidavit of Leon Finley

Corporation; that they have possession of the certificates of stock therefor; that they own, hold and possess the same in full compliance with the law; and that notwithstanding Vesting Order No. 370 issued by the Alien Property Custodian, Washington, D. C., my clients nevertheless still claim to be the bona fide and legal owners of the said shares, and the only ones entitled to possession of the stock certificates therefor.

83 I must advise you that any action that you may take in the premises, whether under Court order or otherwise, will be at your risk entirely, and that the issuance by you of any new certificates representing the shares of stock aforementioned, owned by my clients, will be at your risk entirely, and with the full reservation of all my clients' interests, and without prejudice to any of my clients' rights in the matter.

84 In the event that my clients should suffer any damage at any time hereinafter as a result of any action taken by the Debtor Corporation, and/or the Trustees herein, and/or by their attorneys, and/or by any other person and/or persons who may act herein, my clients and each of them, jointly and/or severally, will look to any and all of the said persons for full compensation, and will hold them fully liable and responsible for any loss or damage that they may suffer in the premises through any action that may be taken by such persons, jointly and/or severally, which shall be contrary to my clients' interests.

Thanking you for your courtesies in this proceeding, and assuring you of my continued cooperation, I am,

Yours very truly,

(sgd.) LEON FINLEY

LF:RP

Exhibit to Affidavit of Leon Finley

CC to:

Goldwater & Flynn, Esqs.
Attention: Mr. Oliver Cowan,
60 E. 42nd St., N. Y. City.

Chadbourne, Wallace, Parke & Whiteside, Esqs.
Attention: Mr. Henry Wolff,
25 Broadway, New York City.

Francis X. Conway, Esq.
Trustee for Silesian American Corp.,
110 E. 42nd St., N. Y. City.

E. O. Sowerwine, Esq.
Trustee for Silesian-American Corp.,
Anaconda Copper Mining Co.,
25 Broadway,
New York City.

Hon. James B. M. McNally
U. S. Attorney,
Attention: Mr. Lynch,
Foley Square, N. Y. City.

George Zolotov, Esq.
Securities & Exchange Commission,
120 Broadway, N. Y. City.

Affidavit Supplementing Petition by Thomas A. McGrath

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

—◆—
[SAME TITLE]
—◆—

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

89

THOMAS A. McGRATH, being duly sworn, deposes and says:

90

I am the attorney of record for Silesian-American Corporation, the Debtor herein, and am familiar with all the proceedings herein, including the order dated April 5th, 1943, directing that cause be shown why the Court should not judicially determine the effect of the demand of the Alien Property Custodian dated February 12th, 1943, that the Debtor cancel on its books the outstanding certificates for Fifty Thousand (50,000) shares of its preferred stock of \$100 per share and 98,000 shares of its common stock without par value, referred to in Vesting Order No. 370, and issue in lieu thereof new certificates registered in the name of the Alien Property Custodian, and why this Court should not issue its instructions to the Debtor with respect thereto, and why this Court should not grant such other further and different relief as is just and proper.

Sections 1 and 2 of Article VI of the By-Laws of the Debtor Silesian-American Corporation read as follows:

“STOCK CERTIFICATES AND TRANSFER OF STOCK.

“Section 1. The certificates of stock of the corporation shall be numbered and shall be entered in the books of the corporation as they are issued.

Affidavit Supplementing Petition by Thomas A. McGrath 91

They shall exhibit the holder's name and the number of shares and shall be signed by the president or a vice-president and the treasurer or an assistant treasurer, or the secretary or an assistant secretary, and shall bear the corporate seal.

"Section 2. Transfers of stock shall be made on the books of the corporation only by the person named in the certificate or by attorney, lawfully constituted in writing, and upon surrender of such certificate."

The order entered herein dated July 30th, 1941 declaring that the Debtor Silesian-American Corporation is unable to meet its debts as they mature and appointing trustees contains the following provisions:

"11. Silesian-American Corporation, and its officers, directors, agents and employees, and all other persons, including but not limited to those claiming to act by, through or under Silesian-American Corporation, are hereby enjoined from interfering in any way whatever with the possession or management of all or any part of the property over which the Trustees are hereby appointed and from interfering in any way to prevent the discharge of their duties or their operation of the business of Silesian-American Corporation; and any parties in interest may apply for further direction of this Court."

Under date of May 18th, 1945, I received a letter from Leon Finley, Esq., attorney of record for La Roche & Co., the Union Bank of Switzerland, the Banque Cantonal de Berne, and Aktiengesellschaft Leu & Company, which letter contained the following paragraphs:

94 *Affidavit Supplementing Petition by Thomas A. McGrath*

95 "You will please be advised that I, as attorney for La Roche & Co., Basle, Switzerland, Union Bank of Switzerland, Zurich, Switzerland, and the other Swiss banks in interest, hereby advise you that according to my best knowledge and information, my clients are the bona fide owners of the said 50,000 shares of the preferred stock of the par value of \$100 per share, and 98,000 shares of the common stock without par value, of Silesian-American Corporation; that they have possession of the certificates of stock therefor; that they own, hold and possess the same in full compliance with the law; and that notwithstanding Vesting Order No. 370 issued by the Alien Property Custodian, Washington, D. C., my clients nevertheless still claim to be the bona fide and legal owners of the said shares, and the only ones entitled to possession of the stock certificates therefor.

96 "I must advise you that any action that you may take in the premises, whether under Court order or otherwise, will be at your risk entirely, and that the issuance by you of any new certificates representing the shares of stock aforementioned, owned by my clients, will be at your risk entirely, and with full reservation of all my clients' interests, and without prejudice to any of my clients' rights in the matter.

"In the event that my clients should suffer any damage at any time hereinafter as a result of any action taken by the Debtor Corporation, and/or the Trustees herein, and/or by their attorneys, and/or by any other person and/or persons who may act herein, my clients and each of them, jointly and/or severally, will look to any and all of the said persons for full compensation, and will hold them fully liable and responsible for my loss or damage that they may

Affidavit Supplementing Petition by Thomas A. McGrath 97

suffer in the premises through any action that may be taken by such persons, jointly and/or severally, which shall be contrary to my clients' interests."

A complete copy of the said letter is annexed hereto and marked Exhibit A.

In connection with subparagraph (c) of paragraph 11 of the petition verified by me March 31st, 1943, it appears that the New York Stock Transfer Tax Law as amended by Ch. 443, L. 1943 (C.C.H. Stock Transfer Guide, p. 36323-2, Par. 6020B) now exempts transfers from a foreign country or national thereof to the United States or any agency thereof pursuant to §5(b) of the Trading With the Enemy Act as amended by the First War Powers Act. It is also observed that the statement in paragraph 9(d) of the petition that "The reference in the statute to 55 Stat. 838 apparently represents an erroneous attempt to refer to the First War Powers Act . . ." is itself incorrect. The reference is a correct citation of that statute. 98

It is also observed that the said petition does not set forth the petitioners' claim that subdivision 5(b) of the Trading With the Enemy Act as enacted by the first War Powers Act of 1941 is unconstitutional, and the said petition is hereby amended so as to include such a claim. 99

It is also noted that the order of July 30th, 1941 herein, appointing trustees, contains no provision authorizing the trustees to permit the officers of the Corporation to make transfers of the outstanding shares of stock of the Corporation on its books in accordance with the provisions of law, or to incur the cost of maintaining the corporate existence of the Debtor including the necessary expenses of the preservation of records, and the registration and transfer of the corporate shares.

(Sworn to by Thomas A. McGrath on June 26, 1945.)

100

Exhibit A to Affidavit of Thomas A. McGrath

This exhibit is the original letter of which a copy is annexed to the affidavit of Leon Finley (pp. 27 to 29, *supra*.)

Order Appointing Trustees

IN THE
DISTRICT COURT OF THE UNITED STATES,

101

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

102

This cause coming on to be heard on the petition of Silesian-American Corporation, verified the 29th day of July, 1941, and duly filed herein on July 29, 1941, and the Court being duly advised of the premises and being satisfied that said petition of Silesian-American Corporation complies with the requirements of Chapter X of an act entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved July 1, 1898, and acts amendatory thereof and supplemental thereto (hereinafter referred to as the "Bankruptcy Act"), and that said petition has been filed in good faith, it is

ORDERED, ADJUDGED AND DECREED:

1. That said petition of Silesian-American Corporation complies with the requirements of Chapter X of the Bankruptcy Act and has been filed in good faith, and that said petition is hereby approved as properly filed under Chapter X of the Bankruptcy Act;

Order Appointing Trustees

103

2. That said petitioner, Silesian-American Corporation, is unable to met its debts as they mature;

3. That by reason of the facts set forth in said petition of Silesian-American Corporation, said petitioner requires relief under said Chapter X of the Bankruptcy Act and adequate relief cannot be obtained under Chapter XI of the Bankruptcy Act;

4. That Francis X. Conway, 233 B'way, N. Y. C., be and he hereby is appointed Trustee of the estate and all and singular the assets and properties, rights and franchises of whatever kind, character and description whatsoever and wheresoever situate, whether within or without the Southern District of New York, of Silesian-American Corporation, and that E. O. Sowerwine, an officer of Silesian-American Corporation, to wit, the Secretary thereof, be and he hereby is appointed an additional Trustee for the purposes specified in Section 189 of the Bankruptcy Act;

104

5. That the amount of the bond to be given by Francis X. Conway as Trustee of the estate of Silesian-American Corporation, conditioned to the fact that he will well and truly perform the duties of his office as such Trustee and duly account for all moneys and properties whatever which may come into his hands, and perform all things which he shall be directed by the Court to do as such Trustee; is fixed at the sum of \$5000, and that the amount of such bond to be given by E. O. Sowerwine as such additional Trustee is fixed at the sum of \$5,000.00/\$

105

6. That said Trustees are entitled forthwith to possession of and vested with the title to the property of Silesian-American Corporation, and shall have and may

Order Appointing Trustees

exercise respectively all powers conferred by the Bankruptcy Act upon Trustees so appointed pursuant to the provisions thereof;

107 7. That without in any way limiting the generality of the foregoing powers, the Trustees appointed hereunder are empowered to manage, operate and conduct the business and properties of Silesian-American Corporation, wherever situate, and to continue to conduct all the business heretofore conducted by Silesian-American Corporation until the further order of this Court, all according to law and subject to such supervision and control by the Court as the Court may exercise by further orders herein they shall not however withdraw funds until further orders of this Court. The appointment of the Trustees is made subject to the further order of this Court and the Court reserves the right to make such other and further orders and to confer such other and further authority on said Trustees, and to impose such limitations and restrictions upon such Trustees, or any of them, in regard to the custody and management of said property, as the Court may deem expedient and necessary;

8. That the Trustees are directed, authorized and empowered to institute and prosecute any suits, actions or proceedings at law, in equity or in courts of bankruptcy, either within or without the Southern District of New York, that may be deemed necessary by the Trustees forthwith to obtain possession and control of any and all property, title to which is vested in the said Trustees under the provisions of this decree and the provisions of the Bankruptcy Act, and fully to effectuate all of the terms and provisions of this decree and of the said Bankruptcy Act, and the Trustees are further directed, authorized and empowered to continue the prosecution of and to be substituted

Order Appointing Trustees

109

or intervene in any suit, action or proceeding, at law, in equity or in courts of bankruptcy, either within or without the Southern District of New York heretofore instituted by or against the petitioner, Silesian-American Corporation;

9. That Silesian-American Corporation and all other persons, firms or corporations having in their possession any of the property of Silesian-American Corporation, are hereby ordered to deliver said property forthwith to the Trustees appointed herein and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper;

110

10. That the Trustees so appointed shall within twenty days of the entry of this order cause a notice to be mailed to each creditor of Silesian-American Corporation at his last known post office address and to the stockholders of Silesian-American Corporation as the same appear upon its books, and to Guaranty Trust Company of New York, as Indenture Trustee under the Collateral Trust Indenture dated August 1, 1926 of Silesian-American Corporation, and to the Securities and Exchange Commission, and to the Secretary of the Treasury, and to publish such notice in the New York Sun that a hearing will be held herein before this Court in Room 1506 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 24th day of September, 1941, at 10 o'clock a. m., at which hearing or at any adjournment thereof objections may be heard to the retention in office of the Trustees appointed hereby upon the ground that they are not qualified, or that said Francis X. Conway is not disinterested, as provided in Section 158 of Chapter X of the Bankruptcy Act;

111

112

Order Appointing Trustees

11. Silesian-American Corporation, and its officers, directors, agents and employees, and all other persons, including but not limited to those claiming to act by, through or under Silesian-American Corporation, are hereby enjoined from interfering in any way whatever with the possession or management of all or any part of the property over which the Trustees are hereby appointed and from interfering in any way to prevent the discharge of their duties or their operation of the business of Silesian-American Corporation; and any parties in interest may
113 apply for further direction of this Court;

114

12. That all creditors, stockholders, and all persons claiming or acting by, through or under them, and all Sheriffs and Marshals and other like officers, agents, attorneys, solicitors, representatives and employees, and all other persons, firms, associations and corporations are hereby enjoined and restrained from instituting, continuing or prosecuting any action at law or suit or proceeding in equity or any other proceeding against Silesian-American Corporation in any court of law or equity, or before any association, organization or arbitration or Referee or umpire or other court or tribunal or otherwise, or from executing or issuing, or causing the execution or issuance out of any court or any public office of any writ, process, summons, attachment, subpoena, replevin, execution or other proceeding, for the purpose of impounding or taking possession of, or interfering with any property constituting the estate of Silesian-American Corporation, or attempting to take into their possession any part of the property constituting the estate of Silesian-American Corporation wheresoever located, whether in this state, judicial district, in any other state, territory or possession of the United States, or elsewhere, and all other persons, firms, association and corporations are hereby enjoined and restrained

6
Order Appointing Trustees

115

from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of, or in any way interfere with any property, assets or effects in the possession of the Trustees, or owned by Silesian-American Corporation, whether in its possession or otherwise, and from doing any act or thing whatsoever to interfere with the possession and management by the Trustees of the assets, properties and business of Silesian-American Corporation, real, personal or mixed, tangible or intangible, of whatsoever kind and description, and wheresoever situated, whether in this state, judicial district, in any other state, territory or possession of the United States or elsewhere, or interfering in any manner directly or indirectly with the possession, operation or management by the Trustees of the estate of Silesian-American Corporation, or interfering in any way with the Trustees in the discharge of their duties, or interfering in any way with the administration and disposition of the affairs and properties constituting the estate of Silesian-American Corporation. All persons, firms, corporations, their agents, attorneys, representatives and employees are hereby enjoined and stayed from commencing or continuing any judicial proceeding to enforce any lien upon the estate of Silesian-American Corporation until further order of this Court, or until after final decree herein. All suits against Silesian-American Corporation are hereby stayed until after final decree herein;

116

117

13. The Court reserves full right and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

Dated: New York, July 30, 1941.

(sgd) JOHN W. CLANCY,
 U. S. D. J.

118

Excerpt from Trustee's Statement

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

119

For the purpose of presenting a complete picture of the status of Silesian-American Corporation (hereinafter sometimes called the "Debtor") the Trustee deems it advisable to set forth herein the background of its organization and purposes, its capital structure, financing, management and personnel so as to show more clearly the results of his investigation into the property, liabilities and financial condition of the Debtor and the operation of its business.

120

Since its incorporation the Debtor has functioned only as a holding company, receiving substantially all of its income from its investments in bonds and in the stock of subsidiary companies and interest on loans to such subsidiaries. Its present financial condition can be traced directly to the impact of world conditions upon the operations of its subsidiaries and particularly to the outbreak of war in Europe.

.

**Efforts to Provide for Full Payment of the 7%
Sinking Fund Gold Bonds**

As a result of the substantial holdings of stock in the Debtor by Non Ferrum, a Swiss corporation, heretofore referred to, the Debtor is a blocked national, pursuant to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and no transaction with respect to its property or assets, pledged or unpledged, may be effected without a license from the Treasury Department. Moreover, presumably because of its relationship as an affiliate

*Efforts to Provide for Full Payment of the 7%
Sinking Fund Gold Bonds*

121

or subsidiary of the Germany Company, Non Ferrum now appears on the "Proclaimed List of Certain Blocked Nationals" which has been promulgated pursuant to Proclamation No. 2497 of the President of July 17, 1941, and for all practical purposes is considered as a national of an enemy country. The shares of stock of the Debtor owned by Non Ferrum had been pledged as security for loans of several million dollars made by certain Swiss banks. Said Swiss banks also own an aggregate of \$640,000 out of the total outstanding \$2,509,500 of the Debtor's 7% Collateral Trust Sinking Fund Gold Bonds, or more than 25% of the entire outstanding bonds. On June 24, 1941, prior to the reorganization proceedings, the Debtor made an application to the Treasury Department for a license to borrow from said Swiss banks the sum of \$2,200,000 which, together with the cash then on hand, would have provided payment in full of principal and interest on all of the outstanding bonds. This arrangement contemplated that the lenders would purchase all of the stock of Silesian Holding Company at \$6.85 per share. Said application was denied by the Treasury Department.

122

After their appointment in this proceeding, the undersigned and E. O. Sowerwine, additional Trustee, continued negotiations with the representatives of said Swiss banks and on or about August 27, 1941 they and the Debtor filed an application with the Treasury Department for a license authorizing a proposed loan of \$2,200,000, the proceeds of which were to be used as before, for the payment in full of principal and interest on the entire outstanding bonds. This application was accompanied by an application for a license authorizing agreements for the sale of shares of Silesian Holding Company (or voting trust certificates therefor) to Swiss interests. The proceeds of the loan were to be made immediately available for payment of the bonds, but the note evidencing the loan, the certificates for shares of stock of Silesian Holding Company, and the purchase price therefor, were to be deposited in escrow, pend-

123

124

*Efforts to Provide for Full Payment of the 7%
Sinking Fund Gold Bonds*

ing the issuance of a further license from the Treasury Department authorizing the release thereof from escrow. This application was likewise denied by the Treasury Department on October 31, 1941.

125

The said Trustees still continued their negotiations in an effort to arrive at some arrangement for which the Treasury Department would issue a license. On December 12, 1941, they and the Debtor filed a new application for a license to authorize the obtaining of a loan from said Swiss banks in the amount of \$1,700,000. Said loan was to be evidenced by a 10 year unsecured note, with interest at 4% per annum (interest payable at maturity), the note to be held in escrow until released by Treasury Department license. The note was to contain a right of prepayment at any time. All previous proposed agreements for sale of the shares of Silesian Holding Company had been rescinded and abandoned. The proceeds of the \$1,700,000 loan, together with available corporate funds, were to be applied to the payment in full of principal and interest on all of the outstanding bonds other than the \$640,000 of such bonds held by said Swiss banks. As to these bonds, an extension agreement was to be entered into for a 10 year period or longer, if necessary under Treasury regulations. As an alternative, a license was requested to permit the Swiss banks to buy the bonds (not owned by them) on the New York Stock Exchange at par and interest. This application was also denied by the Treasury Department on January 23, 1942. To the date of this report, there are no proposals which would warrant the filing of any other application.

126

New York, May 7th, 1942.

FRANCIS X. CONWAY

Trustee in Reorganization Proceedings of
SILESIA-AMERICAN CORPORATION,
25 Broadway, New York, N. Y.

**Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto**

LEON FINLEY
COUNSELOR AT LAW
521 FIFTH AVENUE
NEW YORK
Murray Hill 2-7360

August 21, 1945

Hon. John W. Clancy
U. S. Court House
Foley Square,
New York City.

128

Re: Silesian-American Corp.

My dear Justice Clancy:

I am enclosing herewith the following photostatic copies of documents received by me the other day from Switzerland, which I would kindly ask you to consider on the motion pending before you in the above matter:

1. Letter received by me from La Roche & Co., dated August 4, 1945
2. Affidavit of Dr. Eduard Schulte, dated July 25, 1945
3. Affidavit of Union Bank of Switzerland, dated July 26, 1945
4. Affidavit of Erzag Limited, dated July 28, 1945
5. Affidavit of La Roche & Co., dated July 31, 1945

129

I spoke to your secretary this morning, and advised her of my filing these papers, and request you to be kind enough to give me an appointment at your convenience so that I may discuss the questions contained in the enclosed papers with you.

Thanking you, I am,

Respectfully yours,

LF:RP
Encl.

(sgd.) LEON FINLEY

130

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

LA ROCHE & Co.

Basle, August 4th, 1945.
Rittergasse 25.

Dr. Leon Finley,
Counselor at Law,
New York.
521 Fifth Avenue.

131 Dear Sir,

In conformity with our exchange of telegrams we beg to send you in the meantime the following affidavits:

1. affidavit Dr. Eduard Schulte, actually at Zurich, dated the 25th July 1945,
2. affidavit Union Bank of Switzerland, dated the 26th July 1945,
3. affidavit Erzag Limited, dated the 28th July 1945,
4. affidavit our Bank, dated the 31st July 1945,

132 all of them duly legalized by a competent public notary and certified by U. S. A. Consulate.

Should you need for your proceedings other documents we beg to let us know immediately.

We are looking for your further news and remain, dear Sir,

Yours truly

(Illegible)

4 enclosures.

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

133

A. AFFIDAVIT

I the undersigned Dr. Eduard Schulte actually at Zurich (Switzerland) as a political refugee since December 1943, well known to the State Department of the United States, declare the following under oath:

1. In 1929 a group of Swiss Banks under the leadership of the Union Bank of Switzerland, granted a loan of \$1,500,000. to NON FERRUM Gesellschaft zur Finanzierung von Unternehmungen des Bergbaus und der Industrie der Nichteisenmetalle, Zurich. The following securities were pledged for this loan:

134

98,000 Common shares of the Silesian American Corporation Wilmington/Delaware, as to assignment of pledge dated 12. November 1934,

\$1,500,000.—preferred shares of the Silesian American Corporation Wilmington/Delaware, as to assignment of pledge dated 24. February 1932.

2. On the 25. February 1937 a group of Swiss Banks under the leadership of La Roche & Co., Basle granted to Erzag Ltd. Zurich a loan of Sfr.12.000.000.—and £600.000.—, for which loan my company the Bergwerksgesellschaft Georg von Giesche's Erben, Breslau (Giesche Breslau) pledged in favour of Erzag Ltd. and La Roche & Cie Basle

135

\$3,500,000.—preferred shares of the Silesian American Corporation Wilmington/Delaware.

3. With general power of attorney of Giesche Breslau and NON FERRUM, I committed both Companies on the 19. December 1941, to transfer the voting rights for the pledged preferred and common shares of the Silesian American Corporation at any time and ir-

✓

136

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

revocably. These voting rights have been valuable without any interruption.

4. All other pending questions, regarding the Swiss group La Roche & Co., Basle and its legal and beneficial property of Giesche assets, have been consolidated through an arrangement between La Roche & Co., Basile, Erzag Ltd. and Giesche Breslau on 21. August 1942.

137

The final performance of both above mentioned agreements could however not be notified to anybody without jeopardizing legitimate Swiss and American interests towards Nazi-Germany; the Nazi authorities looked upon all the transactions concluded by the Giesche companies exclusively from the typical Nazi points of view. For this very reason, my personal security (being the head of the Giesche concern) was endangered as long as I lived in Germany and this especially also in connection with my continued interventions for the protection of the American interests against the German "Commissioner for Enemy's property". I succeeded in getting released the company's property from the grip of the Commissioner; without my interventions the Giesche, Spolka Kattowitz would have been completely looted by the Hermann Goering concern and other interested Nazi groups.

138

Zurich, the 25. July 1945.

EDUARD SCHULTE

(Legalization or acknowledgment before Swiss Notary Public dated July 25, 1945, and certification of Notary by Vice-Consul of United States at Zurich, Switzerland.)

(SEAL)

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

139

DECLARATION

We, the undersigned Union Bank of Switzerland herewith confirm the following hypothecation in our favour as representative of a Swiss Consortium of Banks:

98,000 common shares of the Silesian American Corporation, Wilmington/Delaware, USA—New York, for a credit of originally \$1,500,000.—nom. granted to the Non Ferrum, Zurich;

nom. \$1,500,000. pref. shares of the Silesian American Corporation, mortgaged on February 24th, 1932 as security for the above mentioned credit of \$1,500,000.

140

Zurich, July 26th, 1945

UNION BANK OF SWITZERLAND
LEO BIRCHLER JOSEF VOSER

(Legalization or acknowledgment before Swiss Notary Public dated July 26, 1945, and certification of Notary by Vice-Consul of United States at Zurich, Switzerland.)

AFFIDAVIT

The undersigned Erzag Limited confirms herewith that in conformity with the agreement of the 25th February 1937 for a loan of Sfr. 12,000,000—and £600,000.—were pledged \$3,500,000 pref. shares of the Silesian American Corporation, Wilmington/Delaware.

141

The forementioned loan was refinanced through a Swiss Bank group under the leadership of La Roche & Co., Basle and therefore the above mentioned \$3,500,000 pref. shares

142

*Letter of Leon Finley Dated Aug. 21, 1945 and
Letter and Affidavits Annexed Thereto*

of the Silesian American Corporation, Wilmington/Delaware were pledged in favour of La Roche & Co. Basle.
Zurich, July 28th, 1945

ERZAG Limited
RUDOLF HOFER
ENRICO TRENTINI

143

(Legalization or acknowledgment before Swiss Notary Public dated July 30, 1945, and certification of Notary by Vice-Consul of United States at Zurich, Switzerland.)

AFFIDAVIT

The undersigned bank La Roche & Co., Basle, acting as protector of the interests of a Swiss Bank group, confirms herewith the pledging of

\$3,500,000.- pref. shares of the Silesian American Corporation, Wilmington/Delaware

as to assignment of pledge dated 25th February 1937 in favour of a Swiss Bank group under the leadership of the undersigned bank.

144

The foregoing assignment of pledge refers to the affidavit of Dr. Eduard Schulte actually at Zurich, dated 25th July 1945.

LA ROCHE & Co.

MAX RITZ

Basle, July 31st, 1945.

(Legalization or acknowledgment before Swiss Notary Public dated July 31, 1945, certification of Notary's signature by Chancellery of State, Canton of Basle City, dated July 31, 1945, and certification by Vice-Consul of United States at Basle, Switzerland, as to signature of Deputy Chancellor of State.)

Opinion of the Court, Dated Sept. 25, 1945

145

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

In Reorganization No. 79,205.

JOHN W. CLANCY, U. S. D. J.

The debtor corporation has applied to the Court for instructions with respect to its obligation under a demand made by the Alien Property Custodian that it cancel on its books outstanding certificates for some of its shares and issue to him a new certificate therefor. The debtor claims to be fearful to incur double liability through the issue of another certificate for the same stock and the alleged present interest in it of certain Swiss banks. The vesting order of the Custodian found that the stock was held for the benefit of an enemy. The statutory discharge from liability, §5b or §7e, protects the debtor corporation and relieves it of doubt in the premises. Whatever may be the interests or rights of the Swiss banks, they cannot be considered here. Hearsay statements, unsupported by documents, allege that these banks are pledgees of the stock. These statements create no issue for our consideration. The banks are parties herein only to the extent that they have been recognized in the reorganization proceeding as possible owners of a claimed interest which they have never been called upon to prove. They are not here because of any action taken against them or any recognition given them by the Custodian or even by reason of any established interest in the stock.

146

147

The debtor is instructed to issue a new certificate of stock to the Alien Property Custodian.

Dated: New York, N. Y.,

September 25, 1945.

JOHN W. CLANCY,
United States District Judge.

Order Appealed From Dated Oct. 30, 1945

**DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

149 An application by the Debtor for a judicial determination of the effect of the demand of the Alien Property Custodian dated February 12, 1943, that the Debtor cancel on its books the outstanding certificates for 50,000 shares of its preferred stock of the par value of \$100 per share, and 98,000 shares of its common stock without par value, represented by preferred stock certificates Nos. 258, and 288 to 313, inclusive, and common stock certificates Nos. 256 to 265, inclusive, heretofore issued to Non Ferrum Gesellschaft sur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, of Zurich, Switzerland, referred to in Vesting Order No. 370 and issue in lieu thereof new certificates in the name of the Alien Property Custodian and for instructions to the Debtor with respect thereto, and for such other, further and different relief as is just and proper, having come on to be heard before the undersigned on the 26th day of June, 1945, and after hearing Thomas A. McGrath, Esq., attorney for the Debtor, Chadbourne, Wallace, Parke & White-
150 side, Esqs., (by William Gilligan, Esq., of counsel), attorneys for Silesian Holding Corporation, Leon Finley, Esq., attorney for certain Swiss Banks, all in opposition to the claim of the Alien Property Custodian; and John F. X. McGehey, United States Attorney for the Southern District of New York (by William L. Lynch, Assistant United States Attorney, of counsel), attorney for the Alien Property Custodian, in support of the claim of the Alien Prop-

Order Appealed From Dated Oct. 30, 1945

151

erty Custodian; and Goldwater & Flynn, Esqs., (Oliver T. Cowan, Esq., of counsel), attorneys for the trustees, appearing but not opposing the application;

Now, on all the proceedings had herein and the written opinion dated September 25, 1945, filed herein, it is

ORDERED, that the Debtor cancel on its books and records all evidence showing that said 50,000 shares of Preferred Stock (represented by outstanding Certificates Nos. 258 and 288 to 313, inclusive) and 98,000 shares of Common Stock (represented by outstanding Certificates Nos. 256 to 265, inclusive), are owned by said Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle; and it is

152

FURTHER ORDERED, that the Debtor, through its proper officers, be and hereby is directed to take all necessary steps to have issued and delivered to the Alien Property Custodian, Washington, D. C., account numbered 28-1722, in lieu of the outstanding certificates representing the aforesaid shares, new certificates representing 50,000 shares of the Debtor's 7% cumulative non-voting preferred stock and 98,000 shares of the Debtor's common stock; and it is

153

FURTHER ORDERED, that the execution of this Order is hereby stayed for ten days from the date of the entry hereof.

Dated: New York, N. Y.,
October 30th, 1945.

JOHN W. CLANCY,
U. S. D. J.

154

Notice of Appeal, Dated Nov. 3, 1945

**DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

155 NOTICE IS HEREBY GIVEN that Silesian-American Corporation, Debtor above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the Order entered in this proceeding on the 31st day of October, 1945 regarding the cancellation on the records of the Debtor of all evidence showing that certain shares of the Debtor are registered in the name of and owned by Non-Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, of Zurich, Switzerland, and the issuance of new certificates representing the said shares to the Alien Property Custodian, and from each and every part of the said Order.

Dated, at New York, New York, November 3rd, 1945.

156

THOMAS A. McGRATH
Attorney for Debtor
Office & P. O. Address
25 Broadway
Borough of Manhattan
New York City

Copy to:

JOHN F. X. MCGOHEY, Esq.
U. S. District Attorney for
Southern Dis. of N. Y.
Attorney for Alien Property Custodian
U. S. Court House
Foley Square, New York, New York

Notice of Appeal, Dated Nov. 3, 1945

CHADBOURNE, WALLACE, PARKE &
WHITESIDE, Esqs.

Attorneys for Silesian Holding Company
25 Broadway, New York, N. Y.

DAVIS, POLK, WARDWELL, GARDINER
& REED, Esqs.

Attorneys for Guaranty Trust Co.
15 Broad Street, New York, N. Y.

GEORGE ZOLOTAR, Esq.

Attorney for Securities and
Exchange Commission
120 Broadway, New York, N. Y.

LEON FINLEY, Esq.

Attorney for Union Bank of
Switzerland and others
521 Fifth Avenue, New York, N. Y.

GOLDWATER & FLYNN, Esqs.

Attorneys for Trustees
60 East 42nd Street
New York, N. Y.

SCRIBNER & MILLER, Esqs.

Attorneys for Bondholders Protective Committee
40 Wall Street, New York, N. Y.

THE GUARANTY TRUST CO. OF N. Y.

As Transfer Agent of Silesian-American Corp.
140 Broadway, New York, N. Y.

BANK OF THE MANHATTAN CO.,

As Registrar of Silesian-American Corp.
40 Wall Street, New York, N. Y.

160

Assignment of Errors
(Statement of Points)

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

161

NOW COMES SILESIAN-AMERICAN CORPORATION, Debtor-Appellant, by Thomas A. McGrath, its attorney, and in connection with its appeal from the order and each and every part thereof made by the United States District Court, Southern District of New York, under date of October 30th, 1945, and entered October 31st, 1945, directing that the Debtor cancel on its records all evidence showing that certain shares of the Debtor are owned by Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, and in lieu thereof issue new certificates to the Alien Property Custodian for said shares and containing certain other directions, appellant says that in the record, proceedings and order aforesaid, manifest error has intervened to the prejudice of the said appellant to wit:

162

1. The Court erred in making the order appealed from.
2. The Court erred in directing that the Debtor cancel on its books and records all evidence showing that 50,000 of preferred stock and 98,000 shares of common stock of the Debtor are owned by Non-Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, without requiring the surrender and cancellation of outstanding certificates representing the said shares.

Assignment of Errors (Statement of Points)

163

3. The Court erred in directing the Debtor to have issued and delivered to the Alien Property Custodian new certificates representing 50,000 shares of the Debtor's 7% cumulative non-voting preferred stock and 98,000 shares of the Debtor's common stock without requiring the surrender of the outstanding certificates representing the said shares.

4. The Court erred in finding that the statutory discharge from liability contained in Sections 5(b) and 7(c) of the Trading With the Enemy Act protects the Debtor and relieves it of doubt as to the possibility of double liability. 164

5. The Court erred in finding that whatever may be the interest or rights of the Swiss banks; they could not be considered by the Court.

6. The Court erred in failing to give the Swiss banks an opportunity to establish their interest in the shares of the Debtor.

7. The Court erred in assuming that the Vesting Order of the Alien Property Custodian was a valid and effective order. 165

8. The Court erred in failing to find that except for subdivision 5(b) the Trading With the Enemy Act of 1917, c. 106, 40 Statutes at Large 415 *et seq.* as amended, has no vitality with respect to World War II.

9. The Court erred in failing to find as a matter of law that subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, as an autonomous statute is unconstitutional for lack of due process.

166

Assignment of Errors (Statement of Points)

10. The Court erred in failing to find as a matter of law that subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, as an autonomous statute is unconstitutional because it purports to take the property of friendly aliens without making provision for just compensation.

167

11. The Court erred in failing to find as a matter of law that subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, as an autonomous statute is unconstitutional as representing an unlawful delegation of legislative powers as to the seizure of the property of friendly aliens.

12. The Court erred in failing to find as a matter of law that if the Trading With the Enemy Act of 1917 as amended possesses vitality with respect to World War II subdivision 5(b) thereof as amended by c. 593, Title III, 55 Statutes at Large 839, is nevertheless unconstitutional for lack of due process unless the phrase "foreign country" in the vesting clause of subdivision 5(b) is construed as meaning "enemy or ally of enemy foreign country."

168

13. The Court erred in failing to find as a matter of law that if the Trading With the Enemy Act of 1917 as amended possesses vitality with respect to World War II, subdivision 5(b) thereof as amended by c. 593, Title III, 55 Statutes at Large 839, is nevertheless unconstitutional as depriving friendly aliens of their property without just compensation unless the phrase "foreign country" in the vesting clause of subdivision 5(b) as amended is construed as meaning "enemy or ally of enemy foreign country."

14. The Court erred in failing to find as a matter of law that if the Trading With the Enemy Act of 1917 as

Assignment of Errors (Statement of Points)

169

amended possesses vitality with respect to World War II, subdivision 5(b) thereof as amended by c. 593, Title III, 55 Statutes at Large 839, is nevertheless unconstitutional as representing an unlawful delegation of legislative power.

15. The Court erred in failing to find as a matter of law that if the provisions of the Trading With the Enemy Act of 1917 as amended other than subdivision 5(b) possess vitality with respect to World War II, Vesting Order No. 370 of the Alien Property Custodian nevertheless derived no validity from such provisions other than subdivision 5(b) as amended, because the only powers delegated to the Alien Property Custodian by the President were the powers conferred upon the President by subdivision 5(b) as amended.

170

16. The Court erred in failing to find as a matter of law that if subdivision 5(b) of the Trading With the Enemy Act of 1917 as amended by c. 593, Title III, 55 Statutes at Large 839, is constitutional, Executive Order No. 9193 of July 6th, 1942, is nevertheless an unconstitutional exercise by the President of powers granted by subdivision 5(b) as amended:

171

17. The Court erred in failing to find as a matter of law that if the provisions of the Trading With the Enemy Act of 1917 as amended, other than subdivision 5(b), possess vitality with respect to World War II, Section 8 thereof precluded the Alien Property Custodian from taking possession of shares of an enemy or ally of enemy held by a person who was not an enemy or ally of enemy under a lawful pledge or lien or other right in the nature of security which, by law or by the terms of the instrument

172

Designation of Contents of Record

creating such pledge or lien or right might be disposed of on notice of presentation or demand.

18. The Court erred in failing to defer a determination of the issues before it until the Swiss banks were enabled to present the evidence of their rights in the shares claimed by the Alien Property Custodian.

WHEREFORE said appellant prays that said order of said District Court of the United States may be reversed, etc.

173 Dated, New York, New York, Nov. 3, 1945.

THOMAS A. McGRATH,
Attorney for Debtor-Appellant,
Office and Post Office Address:
25 Broadway,
Borough of Manhattan,
New York 4, New York.

Designation of Contents of Record

174

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SILESIA AMERICAN CORPORATION, Debtor-Appellant hereby designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Order to show cause dated April 5, 1943, and supporting petition verified March 31, 1943, with exhibits annexed thereto.

Designation of Contents of Record

175

2. Affidavit of Leon Finley, sworn to July 20, 1945, and exhibits annexed thereto.

3. Affidavit supplementing petition by Thomas A. McGrath, sworn to June 26, 1945, of which a copy of the annexed exhibit appears as an exhibit to the affidavit of Leon Finley, sworn to July 20, 1945.

4. Original order appointing trustees, etc., dated July 30, 1941.

5. That portion of Trustee's Statement and Report of Investigation under Section 167 (5) of the Bankruptcy Act, approved by order dated May 2, 1942, which appears under the following heading:

176

"Effort to Provide for Full Payment of the 7% Sinking Fund Gold Bond."

6. Letter of Leon Finley, dated August 21, 1945, together with photostatic copies, therein referred to, of (1) letter from La Roche & Co., dated August 4, 1945, (2) declaration of Dr. Eduard Schulte, dated July 25, 1945, (3) declaration of the Union Bank of Switzerland, dated July 26, 1945, (4) declaration of Erzag Ltd., dated July 28, 1945, and (5) declaration of La Roche & Co., dated July 31, 1945, including each of the said photostatic copies.

177

7. Opinion of the Court, dated September 25, 1945.

8. Order appealed from, dated October 30, 1945.

9. Notice of appeal, dated November 3, 1945.

10. Assignment of errors, dated November 3, 1945.

178

Stipulation as to the Record

11. Designation of the contents of record.

Dated at New York, N. Y., November 27, 1945.

THOMAS A. McGRATH
 Attorney for Debtor-Appellant
 Silesian-American Corporation
 25 Broadway
 Borough of Manhattan
 New York, N. Y.

179

Stipulation as to the Record

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

 [SAME TITLE]

180

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the District Court in the appeal of Silesian-American Corporation, Debtor, in the above-entitled matter.

IT IS FURTHER STIPULATED AND AGREED that the foregoing shall also constitute a true transcript of the record of the said District Court in the appeal of Silesian Holding Company, a party entitled to be heard in the above entitled matter under the provisions of Sec. 206 of the Bankruptcy Act, except that as to such appeal, in the foregoing notice of appeal, assignment of errors (statement of points), and designation of contents of the record, wherever the words "Silesian-American Corporation, Debtor" appear in any of the said papers (other than in the title) there is deemed

Stipulation as to the Record

181

to have been substituted in place thereof the words "Silesian Holding Company"; and wherever the words "THOMAS A. McGRATH" or "THOMAS A. McGRATH, attorney for SILESIA-AMERICAN CORPORATION, Debtor" appear in the said papers there is deemed to have been substituted in place thereof the words "CHADBOURNE, WALLACE, PARKE & WHITESIDE" or "CHADBOURNE, WALLACE, PARKE & WHITESIDE, attorneys for SILESIA HOLDING COMPANY" respectively.

Dated, New York, New York, December 10th, 1945.

182

THOMAS A. McGRATH
Attorney for Silesian-American Corporation,
Debtor-Appellant

CHADBOURNE, WALLACE, PARKE & WHITESIDE
Attorney for Silesian Holding Company,
Appellant

JOHN F. X. McGOHEY
U. S. District Attorney for the Southern
District of New York
Attorney for Alien Property Custodian,
Appellee

183

GOLDWATER & FLYNN
Attorneys for Trustees, Appellees

GEORGE ZOLOTAR
Attorney for Securities & Exchange
Commission, Appellee

LEON FINLEY
Attorney for Swiss Banks, Appellees

SCRIBNER & MILLER
Attorneys for Bondholders' Protective
Committee, Appellees

DAVIS, POLK, WARDWELL, GARDINER & REED
Attorneys for Guaranty Trust Co. of N. Y.,
Appellee

184

Clerk's Certificate**UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

185

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America, for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 11th day of December, 1945, in the year of our Lord One Thousand Nine Hundred and Forty-Five and the Independence of the United States the One Hundredth and Seventieth.

WILLIAM V. CONNELL
Clerk

186

SEAL

[fol. 63] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1945

No. 225

(Argued June 5, 1946 Decided July 3, 1946.)

Docket No. 20121.

SILESIAN-AMERICAN CORPORATION, and SILESIAN HOLDING
COMPANY, Appellants,

v.

JAMES E. MARKHAM, Alien Property Custodian, Appellee
Before: L. Hand, Augustus N. Hand and Clark, Circuit
Judges

Appeal from an order in bankruptcy of the District Court
for the Southern District of New York, answering a peti-
tion for instructions of a debtor in reorganization under
Chapter X of the Bankruptcy Law.

Leonard P. Moore, for the appellants, James L.
Morrisson, for the appellee.

[fol. 64] L. HAND, Circuit Judge:

The Silesian-American Corporation, a debtor in a reor-
ganization under Chapter X of the Bankruptcy Law, ap-
peals from an order of the Bankruptcy Court, answering
its petition for instructions whether to comply with a de-
mand made upon it by the Alien Property Custodian. The
controversy arose over shares in the debtor which stood
in the name of a Swiss corporation, but the certificates of
which were held by certain Swiss banks as pledgees. The
Alien Property Custodian, on November 17, 1942, passed
a "vesting order" by which he "vested" in himself these
shares of stock based upon a finding that, although they
were "owned" by the Swiss corporation, that corporation
"held" them "for the benefit of . . . a German corpo-
ration"; and on this account they were property of "a
national of a designated enemy country." He also deter-
mined "that to the extent that . . . such nationals
are persons not within a designated enemy country the
national interest . . . requires that such persons be

treated as nationals of the aforesaid designated enemy country." The Custodian served this order upon the debtor on January 18, 1943, and on February 12th, made a demand upon it to cancel the shares on the debtor's books, and to issue in lieu thereof new certificates in the name of 'the Alien Property Custodian.' " Not wishing to comply with this order, because it feared that it might not be protected against the registered shareholder, and particularly against the pledgees, the debtor applied to the Bankruptcy Court for instructions. The Swiss banks appeared at the hearing and opposed the demand of the Custodian; they also announced to the debtor their intention of holding it and its trustee personally responsible for any action which either might take to their prejudice. On October 30, 1945, the [fol. 65] judge directed the debtor to cancel the shares upon its books and to issue new certificates in equal amount to the Custodian. The debtor has appealed from this order, but the Swiss banks have not.

The debtor has no interest in the controversy, legally recognizable, except to be protected against any claims by the pledgees, or by the Swiss corporation in whose name the shares are registered. It has no standing vicariously to assert against the claims of third persons, the interests of those who may appear on its books to be its shareholders; and our inquiry may therefore be confined to whether §5(b) (2) of the Trading with the Enemy Act provides protection for the debtor. (In all that we say we mean to leave unanswered the question whether the pledgees were bound by their appearance in the district court.) The difficulties arise from the amendment in 1941 of §5(b) of the Trading with the Enemy Act. Until that time §7(c) was the only provision which gave power to the President to compel the transfer of alien property; and it was limited to property of an enemy or of an ally of an enemy; for, although §5(b) authorized very wide power to investigate, it did not touch transfers. However, the amendment of 1941—in subsection B of subdivision one—gave power to the President not only to investigate "transactions involving any property in which any foreign country, or national thereof has any interest," but to "compel . . . any . . . transfer" of such property; and as the section expressly covered all property "subject to the jurisdiction of the United States," it included shares of stock in a domestic corporation. *Stoehr v. Wallace*, 255 U. S. 239; *Great Northern*

Railway Company v. Sutherland. 273 U. S. 182. The power of Congress to seize and confiscate enemy property rests upon Art. 1, §8, Clause 11 of the Constitution. *Stoehr* [fol. 66] v. *W. Wallace*, *supra*, p. 242; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 11. Whether it exists at international law may be doubted; but nobody contends that the war power of Congress includes the seizure of the property of friendly aliens. The amendment of §5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any "national emergency declared." It can rest upon Art. 1, §8, Clause 1: i.e. upon the power "to provide for the common Defence and general Welfare"; indeed, so far as we can see, the debtor does not challenge the power itself, but its exercise. It complains that "the amendment delegates an unrestricted discretion to the President, and does not provide "just compensation" for seizures.

As to the first, it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through "rules and regulations." The only objection to this which can be raised is that it disturbs the constitutional "separation of powers"; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed, of statement in any other terms than that the interest of the country demands the prescribed action. That is, however, enough. *New York Central Securities Corp. v. United States*, 287 U. S. 12. The separation of the executive from the legislative power is in the end a matter of degree anyway; thousands of decisions are made every day by administrative officers which involve a balance of conflicting interests—the character- [fol. 67] istic field for legislation. That the power to seize property (call it executive or legislative as one will) may be lawfully conferred without attempting to fix the conditions, is proved by several other statutes of long standing and of universal acceptance: as for example, the power to condemn of the Federal Works Administrator (§341 of Title 40), that of any executive department in the District (§361 of

Title 40), and that of the Secretary of War (§171 of Title 50). Indeed, the power conferred upon the President in §7(c) of the Trading with the Enemy Act itself is without condition; and, so far as concerns unconstitutional delegation, it makes no difference that it is limited to enemy property. Nor does it matter that by Executive Order No. 9095 the President in turn delegated his powers to the Custodian, authorizing him to "vest" in himself the property of a friendly alien when he determined that this was "necessary in the national interest." That was in effect the same condition on which the President's own power was conferred; and in the nature of things the President cannot personally exercise the least fraction of the manifold powers of every description which are granted to him—more truly, which are imposed upon him. If he may not depute their exercise, they are as sterile as stones. Whether Executive Order No. 9095 was definite enough to be valid is separate from whether the power was improperly delegated by Congress. That objection is valid only in case the holder of the seized property may be subjected to duties which he cannot ascertain, which is clearly not true, for all seizures are made by orders *ad hoc*, and the duties imposed are clear and explicit.

The next question is whether a friendly alien whose property has been seized may in any way secure "just compensation." Subsection two of §5(b) declares that compliance with any demand of the Custodian shall be a dis-[fol. 68] charge of any "obligation" of the person on whom it is made, and a defence in any court against being held "liable." (We pass without discussion the patently untenable argument that this covers only "obligations" and liabilities to the United States.) This was necessary, in spite of §7(c), because of the enlarged scope of §5(b); and it left the friendly alien without remedy against the person who should make the transfer. Moreover, neither §5(b) nor any other section of the Trading with the Enemy Act gave him any remedy, unless it were §9(a). A friendly alien stands in a position different from either an enemy or a citizen whose property has been seized. A citizen may avail himself of §9(a) to reclaim his property, as much when it has been seized under §5(b) as under §7(c); if he is successful in the suit, he will be restored to possession, for the seizure will be shown to have been unlawful. Such too was the position of a friendly alien under §9(a) in the original Act. An enemy or an ally of an enemy is positively

and intentionally denied relief, not only in §9(a) but elsewhere, because his property may be forfeited; he can rely only upon the grace of Congress. But by hypothesis a friendly alien can not reclaim his property if the seizure has been lawful; and yet he cannot be deprived of it without just compensation, because the Fifth Amendment protects him. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489. Thus, it can be argued with much force that, unless some provision can be found by which he may secure compensation, §5(b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection 2 would be valid. It so chances that both the debtor and the Custodian take the position that a friendly alien may not sue under §9(a). That may be so, for, although he would have formal capacity to sue under that section—not being [fol. 69] an enemy or an ally of an enemy—in order to recover he would have to “establish” some “interest, right or title” in the seized property; yet, if §5(b) is valid, the seizure would be valid, and by the seizure all his “interest, right and title” would have “vested” in the Custodian. However that may be, it is settled by many decisions of which we need only cite the last—*Yearsley v. Ross*, 309 U. S. 18—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is “just compensation” under the Fifth Amendment. *Submarine Signal Co. v. United States*, 61 Ct. Cls. 652, turned altogether on *Deutsche-Australische Dampfschiffs Gesellschaft v. United States*, 59 Ct. Cls. 450, and has no application here. (The debtor appears to argue that the Custodian’s “vesting” order did not intend to cover the interest of the Swiss banks as pledgees, but that is so plainly untrue, that it need not detain us.)

Next the debtor asserts that in any event §8(a) protected the interest of the Swiss banks from seizure. It is true that in the original Act, §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; and, for argument, we will assume that it forbade disturbing the possession of any pledgee who was not himself an enemy or an ally of an enemy. But after the amendment of §5(b) had extended the power to seize all interests of friendly aliens, §8(a) could no longer protect their pledges, once the Custodian found that the interest of the United States demanded their seizure, any more than it protected

the pledges of enemies or allies of enemies. Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure.

[fol. 70] Finally, we find no basis for the argument that the debtor should not be forced to issue new certificates while the Swiss banks hold the old ones, which the Supreme Court answered directly as to §7 (c) in *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182. To meet this the debtor reasons that, because §7(c) specifically provides for the situation, and §5(b) after its amendment does not, Congress must have had a different purpose as to the seizure of the shares of a friendly alien. That is not really credible, for the result would be that, although when the Custodian seized the shares of an enemy or an ally of an enemy, he could get a new certificate and a marketable title, when he seized the shares of a friendly alien, he would have nothing but his right under the "vesting" order, a title which no buyer would accept. Yet §5(b) (1) itself provides that the seized property may be sold. That is the sort of interpretation which sinks the purpose of the statutes in a perverse loyalty to its text. Section 5(b) after its amendment remained a part of the original Act, quite as much as it had been before; of that the mere fact that it was an amendment ought to satisfy any sensible person. Had §7(c) not contained the express provision for new certificates, we should have held without hesitation that such an incidental power was to be implied as part of the main power, both in §7(c) itself and in §5(b). And it would be a travesty of statutory construction to suppose that when Congress extended the scope of §5(b) it meant to make transfers under it ineffective, because it did not incorporate expressly or by reference the ancillary provisions which out of abundant and unnecessary caution it had already incorporated in §7(c).

[fol. 71] The debtor raises other objections; indeed, it raises every conceivable objection; but we have considered all that deserve discussion, and perhaps more. The effort is of a kind which was often tried during the last war, always without success. The power of the United States peremptorily to reduce to its possession and apply to its use, at moments critical in its history, all property which lies within its power is not to be emasculated by the delays of private litigation; the peril may be overwhelming,

the need imperative. It is enough that reparation will be available, where reparation is due; meanwhile the individual must comply with the immediate demand just as he must comply with the immensely more grievous demand for the possible sacrifice of life and limb, when that too is called for.

Order affirmed.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of July, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

In the Matter of Silesian-American Corp., Debtor.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 73] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, In re Silesian-American Corp. Judgment, United States Circuit Court of Appeals—Second Circuit. Filed July 3rd 1946, Alexander M. Bell, Clerk.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

[141.75] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1946

No. 346

ORDER ALLOWING CERTIORARI—February 17, 1947

A petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

It is further ordered that the order entered October 14, 1946, denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted. The case is assigned for argument immediately following No. 934, Clark, Attorney General vs. Uebersee Finanz-Korporation, A. G.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9445)

IN THE
Supreme Court of the United States

October Term 1946

No. **346**

SILESIAAN AMERICAN CORPORATION, Debtor
and SILESIAAN HOLDING COMPANY,
Petitioners,

against

JAMES E. MARKHAM, Alien Property Custodian,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND SUPPORTING
BRIEF**

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Corporation, Debtor and Si-
lesian Holding Company, Ap-
pellants.

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INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Statement of the matter involved	1
Jurisdictional statement	4
The questions presented	5
Reasons for the allowance of the writ	13
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	15
Opinion of the Court below	15
Jurisdiction	15
Statement of the case	15
Specification of errors	16
Summary of the argument	19
Argument	
I. The present status of the Trading With the Enemy Act is so confused that it presents an important question of Federal law, which has not been, but should be, settled by this Court	21
II. The opinion of the Circuit Court does not con- form with the principles set down by this Court in <i>Markham v. Cabell</i> (1945), 326 U. S. 404 ..	24
III. The theory adopted by the Circuit Court re- garding the delegation by Congress of Legis- lative Power, appears to be in conflict with applicable decisions of this Court and was ap- plied in deciding an important question of Fed- eral law which has not been, but should be, settled by this Court	26

IV. The effect of the decision of the Circuit Court is to sustain a power of uncontrolled expropriation of foreign owned property, and even the property of citizens, whenever the President deems an emergency to exist, and this is a Federal question which has not been, but should be, settled by this Court	31
V. The effect of the decision of the Circuit Court is to violate treaties of friendship with foreign countries, and inasmuch as this Court will not impute to Congress an intention to produce such a result, the Circuit Court decided an important question of Federal law which has not been, but should be, settled by this Court, and the decision appears to be in conflict with applicable decisions of this Court	32
VI. As construed by the Circuit Court §5(b) utterly lacks any provision for due process. It therefore appears to be in conflict with applicable decisions of this Court, and presents an important question of Federal law which has not been, but should be, settled by this Court	35
VII. By holding that the amendment of §5(b) does not represent an exercise of the war powers of Congress, but rather of the power to provide for the common defense and general welfare, the Circuit Court decided an important question of Federal law which has not been, but should be, settled by this Court	36
VIII. The decision of the Circuit Court that a friendly alien whose property has been taken and whose rights are protected by a treaty of friendship and commerce, may recover compensation in the Court of Claims presents an important Federal question which has not been, but should be, settled by this Court	39
Conclusion	42

APPENDIX

The Trading With the Enemy Act

Sec. 5(b)	43
7(c)	46
7(e)	47
8(a)	47
9(a)	48

Definitions of "National"

Executive Order 8389 as amended by Executive Order 8575	50
Executive Order 9095 as amended by Executive Order 9193	51

TABLE OF CASES CITED

Becker v. Cummings (1935), 296 U. S. 74.....	35, 41
Bowles v. Willingham (1944), 321 U. S. 503.....	26
Cheung Sum Shee v. Nagle (1925), 268 U. S. 336-346..	34
Commercial Trust Co. v. Miller (C. C. A. 3d, 1922), 281 F. 804, affd. 262 U. S. 51.....	30
Cook v. United States (1933), 288 U. S. 102, 118-120..	34
Frost v. Wenie (1895), 157 U. S. 46.....	34
Garvin v. \$20,000 Bonds (C. C. A. 2d, 1920), 265 F. 477, affd 254 U. S. 554	35
Great Northern Railway Co. v. Southerland (1927), 273 U. S. 182.....	37
Hunter v. Central Union Trust Co. (D. C. S. D., N. Y. 1920), 17 F. 2d, 174.....	30
In re Chin A. On (1883), 18 F. 506.....	34
Lem Moon Sing v. United States (1895), 158 U. S. 538-50)	34
Markham v. Cabell (1945), 326 U. S. 404.....	5, 19, 23, 24, 25

New York Central Securities Corp. v. U. S., 287 U. S.	
12	8, 27, 28
Panama Refining Company v. Ryan (1934), 293 U. S.	
388-415	26
Pigeon River Imp. Co. v. Cox (1934), 291 U. S. 138-163	34
Stoechr v. Wallace (1921), 255 U. S. 239	12, 36, 37
U. S. v. 243.22 Acres of Land (1942), 43 F. Sup. 561,	
affd. 129 F. 2d 676	38
United States v. Chemical Foundation Inc. (1926),	
272 U. S. 1	12, 37
Yakus v. U. S. (1944), 321 U. S. 414	26
Yearsley v. Ross (1940), 309 U. S. 18	40

TABLE OF STATUTES, ORDERS, ETC., CITED

Bankruptcy Act, Chap. X:

§121 (11 U. S. C. §521)	4
§167(5) (11 U. S. C. §567(5))	2

Constitution, Art. I §8	13, 37
-------------------------------	--------

Convention of Friendship, Commerce and Extradition of 1850 between United States and Switzerland, 2 Mallory, <i>Treaties, Conventions, etc.</i> , p. 1763	33
---	----

Executive Orders:

No. 8389 of April 10, 1940 (amended by No. 8575) ..	2
No. 8575 of June 14, 1941 (see Appendix, p. 50) ..	24, 31
No. 9095 of March 11, 1942 (amended by No. 9193) ..	9, 10
No. 9193 of July 6, 1942 (see Appendix, p. 51) ..	9, 24, 31

First War Powers Act, 1941 (55 Stat. 839)	37
---	----

Judicial Code, §240 (a) (28 U. S. C. §347)	4
--	---

Statutes at Large:

12 Stat. 767	41
48 Stat. 1	32
52 Stat. 885	4
55 Stat. 839	32

Trading With the Enemy Act:

§5(b) (see Appendix p. 43)	5, 6, 7, 8, 11, 12, 16, 18, 20, 21, 25, 26, 28, 29, 31, 32, 34, 35, 36, 37, 38, 39
§7(c) (see Appendix p. 46)	6, 8, 29, 41
§7(e) (see Appendix p. 47)	18
§8(a) (see Appendix p. 48)	5, 6, 11, 16, 23, 24, 25, 33
§9(a) (see Appendix p. 48)	6, 23, 24, 25, 33, 34, 35, 36

Treaties in Force on December 31, 1941, Pub. 2103,

U. S. State Dept., p. 161	33
-------------------------------------	----

The Tucker Act (28 U. S. C. §250 seq.)	40
--	----

United States Code:

✓ Tit. 11 §47	4
11 §521	4
28 §250	17, 40
28 §259	12, 17, 40
28 §347	4
40 §257 seq.	29
40 §341	8, 27, 29
40 §361	8, 27, 29
50 §171	8, 27, 29
50 §174	29
50 p. 210	29

TEXTS, ETC.

Annual Report, Office of Alien Property Custodian, to June 30, 1944, pages 99 and 100	22
Dulles, <i>The Vesting Power of the Alien Property Custodian</i> , 28 Corn. L. Q. 245-250	38
Hyde, <i>International Law</i> , vol. 1, page 714	33
Mallory, <i>Treaties, Conventions, etc.</i> vol. 2 page 1763	33
McNulty, <i>Constitutionality of Alien Property Controls</i> , • XI Law and Contemp. Prob. • 135-141	38

IN THE
Supreme Court of the United States

October Term 1946

No.

**SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,**

Petitioners,

against

JAMES E. MARKHAM, Alien Property Custodian,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**TO THE HONORABLE FRED. M. VINSON, CHIEF JUSTICE OF THE
UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:**

The petitioners Silesian American Corporation and
Silesian Holding Company respectfully show to this Court:

Statement of the Matter Involved

The Silesian American Corporation is a Debtor in a
proceedings for reorganization of a corporation under
Chapter X of the Bankruptcy Act, and the Silesian Holding
Company is the owner of more than half of all the out-
standing shares of the Silesian American Corporation.

The Debtor is a Delaware Corporation whose corporate structure is set forth in the petition filed with the District Court (R. 5). For many years 50,000 shares of Debtor's 7% cumulative non-voting preferred stock (41.67%) with a par value of \$5,000,000, and 98,000 shares of its common stock (49%) without par value but with a stated value of \$490,000, were registered in the name of a Swiss corporation briefly referred to as "Non-Ferrum" (R. 6). This latter corporation was included in the list of blocked nationals revised February 7, 1942 (R. 6).

Debtor's income being derived from sources in Europe, was interrupted by the war and Debtor was consequently unable to meet obligations on a bond issue which matured August 1, 1941 (R. 40 and 41). Petition herein was therefore filed and trustees appointed July 30, 1941 (R. 34-39). In his report under §167 (5) Bankruptcy Act, the trustee found that the Debtor's shares registered in the name of Non-Ferrum had been pledged as security for loans made by certain Swiss banks for several million dollars (R. 41). In 1941 these Swiss banks were willing to lend to the Debtor substantial funds to meet its maturing obligations but the Treasury Department would not license this transaction (R. 41), despite the facts that in the several proceedings before the Treasury the interests of the Swiss banks were clearly established and the banks were not included in the so-called "black list" nor was there any suggestion that they were inimical to the United States (R. 7).

In November 1942, the Alien Property Custodian disregarding the non-enemy interest of the Swiss banks, and disregarding also the fact that the shares were frozen under Executive Order 8389, issued a vesting order upon

a finding that the shares registered in the name of Non-Ferrum were property of "a national of a designated enemy country (Germany)" and "determining that to the extent that any or all such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of the aforesaid enemy country * * *" (R. 14). The order did not mention or express any intention to vest the interests of the Swiss banks.

In February 1943 the Custodian demanded that the Debtor cancel on its books the certificates issued to Non-Ferrum and issue new certificates in the name of the Custodian (R. 16). The outstanding certificates were held by the Swiss bank and their attorney thereupon notified the Debtor that if such new certificates were issued, the Debtor would act at its peril (R. 27). The order appointing trustees contains no provision authorizing the issuance by the Debtor of any certificates (R. 34 to 39).

§8(a) of the Trading With the Enemy Act of 1917 provides that a pledgee of property with power of sale who is not an enemy or ally of enemy may retain possession of the property, and the history of this section in Congress showed that it was not intended that the Alien Property Custodian could summarily take possession of enemy property in the hands of a friendly pledgee. The amendment to §5(b) contained in the First War Powers Act, 1941, authorized the vesting of property of a foreign government or national thereof, but it seemed that in order to sustain the constitutionality of the amendment, it was necessary to construe these words as meaning "enemy or ally of enemy foreign country or national thereof". In addition there were numerous other questions as to the meaning of the

applicable statute and the effectiveness of the procedure resorted to by the Alien Property Custodian thereunder.

The Debtor therefore obtained an order directing that cause be shown why the District Court should not instruct the Debtor under the circumstances (R. 3). A motion, originally returnable May 12, 1943 (R. 3), was adjourned from time to time until June 26, 1945, when it was argued at length, and thereafter an order was made under date of October 30, 1945, directing the Debtor to cancel on its books and records all evidence showing that the described shares are owned by Non-Ferrum, and requiring the Debtor to issue and deliver to the Alien Property Custodian new certificates representing the said shares (R. 50).

An appeal to the Circuit Court of Appeals for the Second Circuit was promptly taken by the Debtor (R. 52) and also by its majority stockholder the Silesian Holding Company (R. 60). The notice of appeal was served upon all parties entitled to notice in the reorganization proceedings. Only the Alien Property Custodian filed a brief and appeared in opposition at the hearing. The appeal was argued on June 5th and the Circuit Court of Appeals affirmed the order of the District Court on July 3rd, 1946, with an opinion by Judge Learned Hand (R. 63 seq.).

Jurisdictional Statement

The basis upon which it is contended that this Court has jurisdiction to review the order of affirmance are the provisions of Sec. 121 of Chap. X of the Bankruptcy Act (52 Stat. 885; 11 U. S. C. §521); the provisions of §47 of the Bankruptcy Act (11 U. S. C. §47), and §240(a) of the Judicial Code (28 U. S. C. §347).

The Questions Presented

1. Whether §8(a) of the 1917 Act is one of the "permanent" sections of the statute?

The appellants argued that in *Markham v. Cabell* (1945) 326 U. S. 404, this Court held that certain sections of the 1917 statute were to be treated as "permanent" in their nature and that §8(a) was one of the sections so to be regarded. In its opinion the Circuit Court said (R. 67), "It is true that in the original Act §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; * * *" but the Court concluded that this had been changed by reason of the 1941 amendment to §5(b).

2. Whether the provisions of §8(a) of the 1917 Act to the effect that a pledgee who is not an enemy or ally of enemy may continue to hold enemy property pursuant to the agreement of pledge, are still applicable?

The appellants argued that whereas §8(a) provides that any person not an enemy or ally of enemy holding property under an agreement of pledge subject to a power of sale, "may continue to hold said property", the Swiss banks as friendly aliens and pledgees were entitled to continue to hold the shares against the demand for possession by the Alien Property Custodian. The Circuit Court said (R. 67), " * * * for argument we will assume that it [§8(a)] forbade disturbing the possession of a pledgee who was not himself an enemy or ally of enemy. But after the amendment of §5(b) had extended the power to seize all interests of friendly aliens, §8(a) could no longer protect their pledges once the Custodian found that the interest of the United States demanded their seizure, any more than it protected the pledges of enemies or allies of enemies.

Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure." The Circuit Court of Appeals thus in effect eliminated from §8(a), and also from §9(a) the phrase "any person who is not an enemy or ally of enemy" and substituted in place thereof the phrase, "any person who is a citizen".

3. Whether §5(b) as amended is unconstitutional because it lacks provision for due process?

The appellants argued that §5(b) is unconstitutional so far as it affects the property of friendly aliens because it fails to meet the requirement of due process. The Circuit Court in its opinion made no reference to this argument.

4. Whether §5(b) as amended is unconstitutional because it purports to authorize the taking of the property of friendly aliens without provision for just compensation?

The appellants argued that §5(b) is unconstitutional because it purports to authorize the taking of property of friendly aliens without provision for just compensation and that the Custodian's claim that just compensation can be obtained under the Tucker Act is not sound for the reason that the Tucker Act withholds from the Court of Claims jurisdiction regarding rights that have become the subject of an international treaty, as is the case with the rights of Swiss citizens, and for the further reason that §7(c) of the Trading With the Enemy Act expressly provides that the sole relief of any person whose property has been seized by the Custodian shall be that provided by the terms of the Trading With the Enemy Act. The Circuit Court in its opinion conceded that (R. 67) "• • • it can be argued with much force that, unless some provision can

be found by which he (a friendly alien) may secure compensation, §5(b) is unconstitutional; * * *. However that may be, it is settled by many decisions * * * that when the United States seizes the property of an individual not an enemy in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is 'just compensation' under the Fifth Amendment." The Circuit Court made no reference to the appellants' argument that aliens whose rights are protected by treaty may not sue in the Court of Claims, which is the only Court where an implied promise may be enforced, nor to the appellants' argument that the sole remedy of a person whose property has been seized by the Custodian is that provided for in the Trading With the Enemy Act.

5. Whether §5(b) as amended is unconstitutional because it represents an unlawful delegation of legislative power?

The appellants argued that §5(b) is unconstitutional because it represents an unlawful delegation of legislative power. In its opinion the Circuit Court states (R. 65), " * * * it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standards except that he shall act through 'rules and regulations'. The only objection to this which can be raised is that it disturbs that constitutional 'separation of powers'; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed of statement in any other terms than that the interest of the country demands the pre-

scribed action. That is, however, enough. *New York Central Securities Corporation v. U. S.*, 287 U. S. 12. The separation of the executive from the legislative power is in the end a matter of degree anyway; thousands of decisions are made every day by administrative officers which involve a balancing of conflicting interests—the characteristic field for legislation. That the power to seize property (call it executive or legislative as one will) may be lawfully conferred without attempting to fix the conditions is proved by several other statutes of long standing and of universal acceptance: as for example, the power to condemn of the Federal Works Administrator (§341 of Title 40), that of any executive department in the District (§361 of Title 40), and that of the Secretary of War (§171 of Title 50). Indeed, the power conferred upon the President in §7(c) of the Trading With the Enemy Act itself is without condition; and, so far as concerns unconstitutional delegation, it makes no difference that it is limited to enemy property. . . .

6. Whether the constitutionality of §5(b) can be preserved only by construing the words "foreign country or national thereof" as meaning "enemy or ally of enemy foreign country or national thereof"?

The appellants argued that the only manner in which the constitutionality of §5(b) could be preserved was to construe the words "foreign country or national thereof" as necessarily meaning "enemy or ally of enemy foreign country or national thereof" because of the fact that §5(b) as amended had been made part of an existing statute designed by Congress as an exercise of its power to confiscate enemy property, in which the criterion phrase was "enemy or ally of enemy". The Circuit Court made no reference to this argument.

7. Whether the exculpatory clauses of §5(b) and §7(e) afford no protection to the Debtor by reason of their unconstitutionality?

The appellants argued that §§5(b) and 7(e) do not protect the Debtor or relieve it from doubt as to liability, (i) because in effect they attempt to enact a conclusive presumption which Congress does not have the power to do; (ii) because they represent an unlawful invasion of the judicial process; and (iii) because §5(b) could not be used to preserve by indirection the constitutionality of a statute otherwise unconstitutional. The Circuit Court based its decision entirely upon the efficacy of §5(b) and therefore made no reference to the argument concerning §7(e). As to §5(b) it made no reference to the argument that the exculpatory clause is unconstitutional as representing a conclusive presumption or an invasion of the judicial process, and concedes that if §5(b) were otherwise unconstitutional it would be doubtful whether the exculpatory clause would be valid. Having held that §5(b) as amended is constitutional, the Court does not expressly state that the exculpatory clause in §5(b) (2) is constitutional, but refers to the clause in a manner which suggests that it is so to be given effect.

8. Whether Executive Order 9193 of July 6, 1942, represents an unlawful delegation of Presidential power?

The appellants argued that even if §5(b) were constitutional, Executive Order 9193 of July 6, 1942 (which supplanted Executive Order 9095 by amendment), under which the Custodian acted, represented an unlawful delegation of Presidential power because by its terms no one could determine whether a friendly alien residing in a non-enemy country was to be treated as "a national of a des-

ignated enemy country" until the Custodian had determined in a particular case that the national interest of the United States required such person to be treated as a national of a designated enemy country. The Circuit Court appears to have misconceived the nature of this argument. In its opinion the Court said (R. 66): " * * * Nor does it matter that by Executive Order No. 9095 the President in turn delegated his powers to the Custodian, authorizing him to 'vest' in himself the property of a friendly alien when he determined that this was 'necessary in the national interest'. That was in effect the same condition on which the President's own power was conferred; and in the nature of things the President cannot personally exercise the least fraction of the manifold powers of every description which are granted to him—more truly which are imposed upon him. If he may not depute their exercise, they are sterile as stones. Whether Executive Order No. 9095 was definite enough to be valid is separate from whether the power was improperly delegated by Congress. That objection is valid only in case the holder of the seized property may be subjected to duties which he cannot ascertain, which is clearly not true, for all seizures are made by orders *ad hoc*, and the duties imposed are clear and explicit."

9. Whether the vesting order in the case at bar effectively vested the interest of any friendly aliens?

The appellants argued that unlike the earlier vesting orders issued by the Custodian prior to July 6, 1942, which expressly vested specified property upon a finding that it belonged to a national of a foreign country, the vesting order in the case at bar did not on its face purport, and did not in fact by its terms, vest the interest

of any friendly alien in the described shares. The Circuit Court disposed of this argument by parenthetically saying (R. 67), "(The Debtor appears to argue that the Custodian's 'vesting' order did not intend to cover the interest of the Swiss banks as pledgees, but that is so plainly untrue, that it need not detain us.)"

10. Whether the vesting order gave effect to a statute designed to authorize the expropriation of the property of friendly aliens instead of a statute designed to confiscate enemy property?

The appellants argued that the vesting order was designed as an exercise of the power to confiscate enemy property, and if §5(b) was actually an exercise by Congress of its power of eminent domain, the vesting order was not framed so as to affect the interests of the Swiss banks. The Circuit Court of Appeals made no reference to this argument.

11. Whether the vesting order derives any vitality from provisions of the Trading With the Enemy Act other than §5(b)?

The appellants argued that the vesting order derived such vitality as it possessed solely from §5(b) as amended, and inasmuch as §5(b) was either unconstitutional or if constitutional did not by reason of §8(a) authorize the Custodian to take possession of the pledged shares, the District Court could not lawfully require the Debtor to issue new certificates. The Circuit Court held §5(b) as amended constitutional and as set forth in subparagraph 2 *supra*, construed §8(a) as having been modified so as to apply only to American citizens instead of "any person not an enemy or ally of enemy".

12. Whether §7(c) precludes any relief or remedy except that provided by the Act.

§7(c) (Appendix p. 46) provides that the sole relief and remedy of any person having any claim to any money or other property seized by the Custodian shall be that provided by the terms of "this Act". The appellants argued that this provision precluded the Swiss banks from seeking compensation under any other statute. The Circuit Court, in its opinion, made no reference to this argument.

13. Whether a subject of Switzerland whose property is taken and is given no means of recovering just compensation, may sue in the Court of Claims in view of the provisions of §259 Tit. 28 U. S. C.?

The appellants argued before the Circuit Court that §259 Tit. 28 U. S. C. which provides that the United States Court of Claims shall not have jurisdiction of claims dependent upon a treaty, precludes any proceeding by the Swiss banks in the Court of Claims, because their rights rest primarily upon the Treaty of Friendship of 1850. The Circuit Court, in its opinion, made no reference to this argument.

14. Whether §5(b) as amended represents an exercise of the War Power of Congress or of the power to provide for the common defense and promote the general welfare?

This point was not argued before the Circuit Court by either party. The Circuit Court said (R. 65):

"The power of Congress to seize and confiscate enemy property rests upon Art. 1, §8 Clause 11 of the Constitution. *Stoehr v. Wallace*, 255 U. S. 239, 242; *United States v. Chemical Foundation Inc.*, 272 U. S. 1, 11. Whether it exists at international law may be doubted; but nobody contends that the war

power of Congress includes the seizure of the property of friendly aliens. The amendment of section 5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'. It can rest upon Art. 1, §8, Clause 1; i. e. upon the power 'to provide for the common Defense and general Welfare'; indeed, so far as we can see, the Debtor does not challenge the power itself, but its exercise."

15. Whether by the provision of §5(b) as amended the President in time of emergency declared by him may vest the property of foreign countries or nationals thereof?

This question was not argued by either party before the Circuit Court of Appeals. The Circuit Court however in its opinion states (R. 65) "the amendment of §5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'."

Reasons for the Allowance of the Writ

1. The Court below has decided several important questions of Federal law which have not been, but should be, settled by this Court.

2. The Court below has decided several Federal questions in a way probably in conflict with applicable decisions of this Court.

These reasons are discussed in petitioners' brief (pp. 21 to 42 *infra*).

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled in its Docket No. 20121 (No. 225—October Term 1945), *Silesian American Corporation Debtor, and Silesian Holding Company, Appellants v. James E. Markham, Alien Property Custodian Appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order herein of the said Circuit Court of Appeals be reversed by this Court and for such further or different relief as to this Court may seem proper.

Dated, New York, New York, August 1, 1946.

GEORGE W. WHITESIDE,
Counsel for Silesian American
Corporation, Debtor and Si-
lesian Holding Company, Ap-
pellants.

LEONARD P. MOORE,
WILLIAM GILLIGAN,
Of Counsel.

IN THE
Supreme Court of the United States

October Term 1946

No.

**SILESIA AMERICAN CORPORATION, Debtor
and SILESIA HOLDING COMPANY,**
Petitioners,
against.

JAMES E. MARKHAM, Alien Property Custodian,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion in the Circuit Court of Appeals for the Second Circuit has not yet been reported but appears in the certified copy of the Transcript of Record (R. 63 seq.). The opinion of the District Court also appears in the transcript (R. 49).

Jurisdiction

Reference is made to the jurisdictional statement in the petition (p. 4).

Statement of the Case

Reference is made to the "statement of the matter involved" in the petition (pp. 1-4).

Specification of Errors

1. The Circuit Court erred in failing to hold that under the provisions of §8(a) a friendly alien holding enemy property as pledgee with a power of sale may retain possession of such property as against the demand of the Alien Property Custodian.
2. The Circuit Court erred in holding that after the amendment of §5(b) by the First War Powers Act 1941, §8(a) could no longer protect the possession of friendly alien pledgees.
3. The Circuit Court erred in failing to hold that the vesting provision contained in §5(b) as amended is unconstitutional as to friendly aliens for lack of due process unless the words "foreign country or national thereof" are construed as "enemy or ally of enemy foreign country or national thereof".
4. The Circuit Court erred in failing to hold the vesting provision contained in §5(b) as amended unconstitutional as to friendly aliens, as representing an unlawful delegation of legislative power unless the words "foreign country or national thereof" are construed to mean "enemy or ally of enemy foreign country or national thereof."
5. The Circuit Court erred in failing to hold the vesting provision contained in §5(b) as amended unconstitutional as to friendly aliens in authorizing the taking of property without provision for just compensation unless the words "foreign country or national thereof" are construed to mean "enemy foreign country or national thereof."

6. The Circuit Court erred in holding that a friendly alien stands in a position different from either an enemy or ally of enemy or a citizen whose property has been seized.

7. The Circuit Court erred in failing to hold that a friendly alien may not be deprived of his property without due process of law.

8. The Circuit Court erred in holding that a friendly alien whose property has been seized by the Alien Property Custodian is justly compensated by an implied promise to pay just compensation.

9. The Circuit Court erred in failing to hold that the provisions of §250 Tit. 28 U. S. C. whereby suit may be brought against the United States in the United States Court of Claims for property taken, are not available to the Swiss banks because their rights rest primarily on a treaty of friendship between Switzerland and the United States and §259 Tit. 28 U. S. C. deprives the United States Court of Claims of jurisdiction when the claim is dependent on a treaty.

10. The Circuit Court erred in failing to hold that §7(c) of the Trading With the Enemy Act precludes any relief or remedy to a person whose property has been seized except that provided by the said Act.

11. The Circuit Court erred in failing to hold that the power exercised by Congress in authorizing the President to vest the property of any foreign country or national thereof was the same power that had been exercised in enacting the Trading With the Enemy Act of 1917.

12. The Circuit Court erred in holding that the power exercised by Congress in amending §5(b) of the Trading

With the Enemy Act was the power to provide for the common defense and promote the general welfare.

13. The Circuit Court erred in holding that a statute which is claimed to represent the Congressional power to provide for the common defense and promote the general welfare is to be construed with the same constitutional criteria as are applied to a war-time statute requiring the individual to sacrifice life and limb.

14. The Circuit Court erred in failing to hold that the exculpatory clauses of §5(b) and §7(e) are unconstitutional as representing attempts to establish by statute conclusive presumptions.

15. The Circuit Court erred in failing to hold that §5(b) and §7(e) are unconstitutional as representing attempts to invade the judicial process.

16. The Circuit Court erred in holding that under §9(a) a friendly alien would have the formal capacity to sue because he is not an enemy or ally of enemy, whereas the Court holds that under §8(a) he would not have the formal capacity to retain possession of pledged property.

17. The Circuit Court erred in failing to hold that even though §5(b) is constitutional, executive order No. 9193 of July 6, 1942, is an unconstitutional exercise of the powers granted by §5(b) so far as it affects the case at bar.

18. The Circuit Court erred in assuming that the vesting order of the Alien Property Custodian was a valid and effective order so far as the interests of the Swiss banks are concerned.

19. The Circuit Court erred in holding that so far as §5(b) as amended authorizes the President to vest the property of friendly aliens in time of emergency declared by the President it is a constitutionally valid statute.

20. The Circuit Court erred in affirming the order of the District Court.

Summary of Argument

I. The present status of the Trading With the Enemy Act is so confused that it presents an important question of Federal law, which has not been, but should be, settled by this Court.

II. The opinion of the Circuit Court does not conform with the principles set down by this Court in *Markham v. Cabell* (1945), 326 U. S. 404.

III. The theory adopted by the Circuit Court regarding the delegation by Congress of Legislative Power, appears to be in conflict with applicable decisions of this Court and was applied in deciding an important question of Federal law which has not been, but should be, settled by this Court.

IV. The effect of the decision of the Circuit Court is to sustain a power of uncontrolled expropriation of foreign owned property, and even the property of citizens, whenever the President deems an emergency to exist, and this is a Federal question which has not been, but should be, settled by this Court.

V. The effect of the decision of the Circuit Court is to violate treaties of friendship with foreign countries, and inasmuch as this Court will not impute to Congress an

intention to produce such a result, the Circuit Court decided an important question of Federal law which has not been, but should be, settled by this Court, and the decision appears to be in conflict with applicable decisions of this Court.

VI. As construed by the Circuit Court §5(b) utterly lacks any provision for due process. It therefore appears to be in conflict with applicable decisions of this Court, and presents an important question of Federal law which has not been, but should be, settled by this Court.

VII. By holding that the amendment of §5(b) does not represent an exercise of the war powers of Congress, but rather of the power to provide for the common defense and general welfare, the Circuit Court decided an important question of Federal law which has not been, but should be, settled by this Court.

VIII. The decision of the Circuit Court that a friendly alien whose property has been taken and whose rights are protected by a treaty of friendship and commerce, may recover compensation in the Court of Claims, presents an important Federal question which has not been, but should be, settled by this Court.

POINT I

The present status of the Trading With the Enemy Act is so confused that it presents an important question of Federal law, which has not been but should be settled by this Court.¹

The Trading With the Enemy Act of 1917 enacted in connection with World War I was a very important Federal statute that frequently came before this Court for construction. If that statute had not been amended by Congress in connection with World War II many questions which now arise could have been settled by the prior decisions. The First War Powers Act, 1941, however undertook to enact new legislation for handling enemy property. In the Congressional debate Title III of this statute was described as a reenactment of the Trading With the Enemy Act of 1917, the continued vitality of which was a subject of doubt. The form which the new legislation took was an amendment to §5(b) of the previously existing statute. The amendment was very broad in its terms, was described by the House Judiciary Committee as permitting "the establishment of a complete system of alien property treatment" and it was made applicable not only in time of war but also during emergencies declared by the President. If read without relation to the other sections of the old statute of which it became a part, §5(b) purported to deal not with enemy property, but with property of any foreign country or national thereof. Moreover, if the provisions dealing with

¹ §§5(b), 7(c), 7(e), 8(a) and 9(a) of the Act are set forth in the Appendix hereto, pages 43 *seq.*

foreign property were literally construed without reference to the other sections of the 1917 Act, serious questions of constitutionality were raised and the statute could not represent an exercise by Congress of its power during time of war to make rules for captures on land and water, for which reason it would not be entitled to the more liberal construction accorded wartime grants of legislative power.

In the early efforts to administer the statute the President and also the Alien Property Custodian proceeded upon the obvious theory that although enacted as an amendment to a single section of the 1917 Act, it nevertheless constituted a separate and independent grant of power having to do with all alien property. Hence the vesting orders issued prior to July 6, 1942, contained a finding that specified property belonged to a foreign country or national thereof and was therefore vested without any point being made as to whether it was enemy owned.²

It is probable that the exercise of these broad powers alarmed friendly foreign nations and on July 6, 1942, by Executive Order 9193 a new scheme was devised for administering the statute in a manner that seemed to simulate the practices that had been followed in World War I. Although §5(b) as amended, itself contained no reference to the word "enemy" there was introduced by this Executive Order the term "designated enemy country" and

² See the list of early vesting orders and the Federal Register citations at pages 99 and 100, *Annual Report, Office of Alien Property Custodian to June 30, 1944*. Vesting Order 48, dated July 8, 1942, 7 F. R. 5737 is the first order which "finds that the described property "is property of a national and represents a business ownership of a business enterprise within the United States which is a national of a designated enemy country (Japan)".

"national of a designated enemy country". These definitions were so comprehensive that it was possible for a wholly guileless citizen of the United States to be treated as a national of a designated enemy country if the Alien Property Custodian in a particular case determined that the interests of the United States so required, and as a matter of policy and practice, vestings were thereafter generally limited to property found to belong to a national of a designated enemy country.

The result has been to produce a condition of chaos in all serious attempts to interpret the statute.

In the case at bar many aspects of the statute come under consideration because the basic question involved is whether by any interpretation of the statute, an American corporation in the custody of a District Court may be required to issue new certificates for shares standing on its books in the name of a Swiss corporation which the Custodian has found to be a national of a designated enemy country, when the trustee appointed by the Court reported before the outbreak of war that such shares had been pledged with friendly aliens to secure a substantial loan, and hence, the certificates representing the shares were not surrendered by the Custodian.

Not only the constitutionality of the statute, but also its meaning are subject to serious doubt, as appears from the opinion of the Court below. The opinion of this Court in *Markham v. Cabell*, 326 U. S. 404, established the doctrine that the "permanent" provisions of the 1917 statute have not lost their vitality, and that §9(a) is still to be given effect so far as American citizens are concerned, but this Court has not yet been called upon to decide how §5(b) as amended should be construed so as to preserve its constitutionality with respect to friendly aliens, and what

effect that section has had upon the provisions of §§8(a) and also 9(a) which have heretofore protected the rights of friendly aliens.

A decision by this Court is therefore necessary to settle the law.

POINT II

The opinion of the Circuit Court does not conform with the principles set down by this Court in *Markham v. Cabell*, 326 U. S. 404.

In its opinion the Circuit Court conceded that §8(a) prior to the amendment of §5(b) in 1941, "protected a pledgee who was a friendly alien just as it protected a citizen pledgee" (R. 67). As much is also said concerning §9(a) (R. 66). After the enactment of §5(b) however, the Circuit Court states, "§8(a) could no longer protect¹ the pledges of friendly aliens, "any more than it protected the pledges of enemies or allies of enemies" (R. 67). A similar conclusion is implied with respect to §9(a) (R. 66).

Thus the Circuit Court has entirely changed the meaning of §8(a) and §9(a). Whereas these sections originally applied to persons who were not enemies or allies of enemies, as now construed by the Circuit Court they apply only to persons who are citizens. The Circuit Court does not contemplate the problem that would arise if a citizen were determined to be a national of a foreign country by the extraordinary definitions of "national" that have been established through executive order in the administration of the statute.²

² The definitions of "national" currently employed in Executive Orders 8575 and 9193 are set forth in the Appendix hereto, pages 50 *seq. infra*.

The opinion of this Court in *Markham v. Cabell* (1945), 326 U. S. 404, does not indicate that this Court intended any such result. Mr. Justice Douglas said at page 410:

"The right to sue explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending section 5(b) desired to delete or wholly nullify section 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as part of an integrated whole. We should give each as full a play as possible."

Mr. Justice Burton, in his opinion (p. 416) states that certain sections of the 1917 Act, including specifically §9, were intended as permanent legislation. What is true of §9 must also be true of §8, from which it follows that §8(a) and §9(a) were permanent portions of the statute with which the provisions of §5(b) should be integrated.

No such integration has taken place in the decision of the Circuit Court. Instead of integrating §5(b) with §§8(a) and 9(a), the Circuit Court has obliterated very substantial portions of the older sections.

Whether such a result represents a true construction to be placed upon §5(b) will not be known until the question has been passed upon by this Court.

3

POINT III

The theory adopted by the Circuit Court regarding the delegation by Congress of Legislative Power, appears to be in conflict with applicable decisions of this Court and was applied in deciding an important question of Federal law which has not been, but should be, settled by this Court.

By resting the efficacy of §5(b) on the common defense and general welfare clause, and emphasizing the point that the amendment was not limited to time of war but was to go into effect upon any national emergency, the Circuit Court removed the statute from the category of war-time emergency legislation, and thereby denied it the tolerance accorded to other statutes confined by their terms to the period of World War II (Cf. *Yakus v. U. S.* (1944), 321 U. S. 414; *Bowles v. Willingham* (1944), 321 U. S. 503). Consequently, when so construed, §5(b) must meet the tests imposed without the background of war. These were stated by Mr. Chief Justice Hughes in *Panama Refining Company v. Ryan* (1934) 293 U. S. 388-415 as follows:

“ . . . Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.”

And in holding that §9(c) of the National Industrial Recovery Act was unconstitutional, he said at page 430:

“ . . . As to the transportation of oil production in excess of state permission, the Congress has de-

clared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

In its opinion, the Circuit Court of Appeals made no pretense of meeting these requirements. It states (R. 65):

"* * * it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through 'rules and regulations'. The only objection to this which can be raised is that it disturbs the constitutional 'separation of powers'; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed, of statement in any other terms than that the interest of the country demands the prescribed action. That is, however, enough. *New York Central Securities Corp. v. U. S.*, 287 U. S. 12. The separation of the executive from the legislative power is in the end a matter of degree anyway; thousands of decisions are made every day by administrative officers which involve a balance of conflicting interests—the characteristic field for legislation. That the power to seize property (call it executive or legislative as one will) may be lawfully conferred without attempting to fix the conditions, is proved by several other statutes of long standing and of universal acceptance; as for example, the power to condemn of the Federal Works Administrator (§341 of Title 40), that of any executive department in the District (§361 of Title 40), and that of the Secretary of War (§171 of Title 50). Indeed, the power conferred upon the

President in §7(c) of the Trading With the Enemy Act itself is without condition; and, so far as concerns unconstitutional delegation, it makes no difference that it is limited to enemy property. * * *

The above statement not only gives expression to a new theory for the delegation of legislative power; it also imports into §5(b) provisions which it does not contain and misapprehends the significance of the case and the statutes cited.

§5(b) stipulates that the President " * * * may * * * under such rules and regulations as he may prescribe * * * " do the various acts specified. The statute contains no requirement that the issuance of rules and regulations shall be a condition precedent to any such acts, and it is therefore grievously incorrect to suggest that Congress has provided a standard to be determined through rules and regulations.

The suggestion that the power contained in §5(b) is to be exercised only when the interest of the country demands, also lacks authenticity. There is no such requirement in the statute. The most that the statute contains is a provision that once property has been vested, it is to be held "in the interest and for the benefit of the United States". This certainly does not constitute a limitation on the power to vest.

The statement that the interest of the country demands the prescribed action is sufficient to sustain a delegation of Congressional power is not supported by the case which the Court cites, viz. *New York Central Securities Corporation v. U. S.*, 287 U. S. 12. That case involved the Transportation Act of 1920. The Act expressly stated its purpose, set forth its policy, and authorized the Interstate

Commerce Commission after holding hearings and investigating the matter, to approve certain rearrangements in the transportation system which would "best promote the service in the interest of the public and the commerce of the people". In that statute Congress expressly declared a policy, set up standards to guide the Commission's action, and required findings by the Commission as a condition precedent to the exercise of such authority. None of these safeguards are to be found in §5(b) as amended. As stated by the Circuit Court, it "gives the President unrestricted power to be exercised at his discretion".

The reference by the Circuit Court to the powers of the Federal Works Administrator (§341 Title 40); the executive departments of the District (§361 Title 40) and the Secretary of War (§171 Title 50) are all misleading and do not sustain the point for which they are cited, because so far as acquiring property without the owner's consent is concerned, the powers granted by each statute are powers to condemn property for the use of the Government through the provisions of §§257 *et seq.* of Title 40 requiring a recourse to judicial proceedings. The mere *ipsi dixit* of the particular official has no effect until it is implemented by an order of the court, and its exercise is circumscribed by other requirements. §171 of Title 50, for example, is limited by §174 of the same Title so that the Secretary of War may not "involve the Government in any contract or contracts for the future payment of money, in excess of the sum appropriated therefor".

As to the statement that the power conferred upon the President by §7(c) of the 1917 Act is without condition, this also is incorrect, because that section required an investigation and determination by the President and a showing that the property belonged to an enemy or ally of

enemy not licensed by the President: (50 U. S. C. A., p. 210, Appendix p. 46, *infra*).

In *Commercial Trust Company v. Miller* (C. C. A. 3d, 1922), 281 F. 804 *affd.* 262 U. S. 51, Judge Wooley at page 806 implied that any irregularity or insufficiency on the part of the Alien Property Custodian in complying with the requirements of §7(c) would have rendered the seizure invalid, and in the Supreme Court, Mr. Justice McKenna at page 56, indicated that a determination pursuant to the provision of §7(c) was a condition precedent to a lawful seizure. In *Hunter v. Central Union Trust Co.* (D. C. S. D. N. Y., 1926) 17 F. 2d 174, it was held that a failure to make a determination in compliance with the requirement of the statute rendered an attempted seizure by the Custodian invalid. The Government seems to have acquiesced in this decision by failing to take an appeal.

The opinion of the Circuit Court of Appeals holds in effect that Congress may grant to the executive power to seize property without limitation, and without even indicating the policy to be pursued in making the seizures. Such a doctrine goes so much further than any decision ever enunciated by this Court that the national interest requires the subject to be reviewed.

POINT IV

The effect of the decision of the Circuit Court is to sustain a power of uncontrolled expropriation of foreign owned property, and even the property of citizens, whenever the President deems an emergency to exist, and this is a Federal question which has not been, but should be, settled by this Court.

In its opinion the Circuit Court of Appeals states (R. 65), "The amendment of §5(b) must therefore rest on some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'." The opinion may therefore be understood as holding that the President may declare an emergency for the determination of which Congress has set no standard, and by reason of such declaration, the President may expropriate or otherwise deal with property belonging to foreign governments or nationals thereof in the same manner as such property was dealt with in time of war. Furthermore, the word "national" may be made to mean anything that the President by executive order wishes. Under the present definition, a "national" may be an American citizen, and thus a way may be found for expropriating the property of even American citizens.⁴ No manner of due process is provided in connection with the exercise of this power, and according to the Circuit Court, the only remedy available to a person whose property has been taken is a

⁴ The definitions of "national" currently employed in Executive Orders 8575 and 9193 are set forth in the Appendix hereto, pages 50 *seq. infra*.

proceeding in the Court of Claims on an implied promise to pay.

There are many reasons why §5(b) may be unconstitutional so far as it relates to a declared emergency, as compared with a state of war, and the opinion of the Circuit Court of Appeals should not be allowed to stand as a misleading signpost for hasty action by future executives. If the power to vest foreign property represented an exercise of the War Power of Congress, then, at least the emergency contemplated must necessarily be an emergency connected with war. The emergency clause was first introduced in 1933 (48 Stat. 1) in connection with the regulation of foreign exchange and currency. The power to vest foreign property was first introduced immediately after the declaration of war (55 Stat. 839). It is therefore evident that the word "emergency" has a different meaning as to different portions of the statute.

These considerations make highly desirable a review of the subject by this Court.

POINT V

The effect of the decision of the Circuit Court is to violate treaties of friendship with foreign countries, and inasmuch as this Court will not impute to Congress an intention to produce such a result, the Circuit Court decided an important question of Federal law which has not been but should be settled by this Court, and the decision appears to be in conflict with applicable decisions of this Court.

If the phrase "foreign country or national thereof" contained in §5(b) is not construed as amending "enemy or ally of enemy foreign country or national thereof", but

is given the meaning ascribed to it by the Circuit Court, the necessary result is to violate practically all treaties of friendship with foreign nations.

In its opinion the Circuit Court said (R. 66):

"A friendly alien stands in a position different from either an enemy or a citizen whose property has been seized."

By reason of the distinction thus declared, a pledgee under §8(a) who is a citizen may retain possession of his property, whereas a friendly alien may not do so. The opinion expressly says as much (R. 67). And under §9(a), a citizen whose property has been seized may recover it, but if it be the property of a friendly alien, he is relegated to a suit on an implied promise (R. 66).

Article 1 of the *Convention of Friendship, Commerce and Extradition*, of 1850, between the United States and Switzerland (2 Mallory, *Treaties, Conventions* etc. p. 1763), which is still in effect (*Treaties in Force on December 31, 1941*, Pub. 2103, U. S. State Dept. p. 161), provides that "The citizens of the United States of America and the citizens of Switzerland shall be * * * treated upon a footing of reciprocal equality in the two countries * * * they * * * shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens * * *. No * * * more burdensome condition shall be imposed upon * * * the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall ~~not~~ be subject."

These clauses mean that the property rights of a friendly alien must be respected in the same manner as are those of our citizens (Cf. 1 Hyde *International Law*,

p. 714). Such a result does not follow however when §5(b) is construed to mean that under §8(a) a citizen may retain possession of property held as a pledge whereas a friendly alien must surrender it, or that a citizen may recover in a proceeding under §9(a) property seized by the Custodian, whereas a friendly alien may not recover the property under any circumstances and may only obtain on an implied promise after a protracted litigation its reasonable market value at the time of seizure.

It is inconceivable that in enacting §5(b) Congress intended such a disruption of our international obligations.

In interpreting Congressional enactments an intention to supersede a treaty will not be readily implied. *In re Chin A. On* (1883), 18 F. 506; *Frost v. Wenie* (1895), 157 U. S. 46; *Lem Moon Sing v. U. S.* (1895), 158 U. S. 538-50; *Cheung Sum Shee v. Nagle* (1925), 268 U. S. 336-346; *Pigeon River Imp. Co. v. Cox* (1934), 291 U. S. 138-163.

If the decision of the Circuit Court is to stand, one may expect that all nations with whom we have treaties of friendship entered into before 1941 will wish to renegotiate these treaties, so that the new treaties will supersede the provisions of §5(b) and thus be deemed to have nullified the power of seizure therein contained so far as the particular nation is concerned (*Cook v. U. S.* (1933), 288 U. S. 102, 118-120).

The effect of the decision of the Circuit Court of Appeals on such an important aspect of our international relations should be sufficient in itself to prompt this Court to review a decision capable of producing the results indicated.

POINT VI

As construed by the Circuit Court §5(b) utterly lacks any provision for due process. It therefore appears to be in conflict with applicable decisions of this Court, but presents an important question of Federal law which has not been but should be settled by this Court.

In *Garvin v. \$30,000 Bonds* (C. C. A. 2d 1920) 265 F. 477, affd. 254 U. S. 554, the Circuit Court of Appeals for the Second Circuit itself said at page 479:

"* * * If persons not alien enemies or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9."

The doubtful constitutionality of the statute lacking the remedy provided by §9(a) was also mentioned by Mr. Justice Stone in *Becker v. Cummings*, (1935) 296 U. S. 74, where he said at page 79:

"The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it."

and at page 81:

"* * * its (The Trading With the Enemy Act) dominant purpose, often recognized by this Court (is) to give to citizens and alien friends an adequate remedy for invasions of their property rights in the

exercise of the war powers of the Government. Any other constructions by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies."

If the Circuit Court of Appeals for the Second Circuit in 1920 believed that a statute lacking the remedy of §9(a) would be unconstitutional, and this Court in 1935 entertained serious doubt as to whether it would be constitutional, it would seem incumbent upon this Court as a simple matter of clarifying the record to review the subject and determine whether §5(b) when construed as lacking the remedy of §9(a) so far as friendly aliens are concerned is now constitutional in spite of the previous *dicta* to the contrary.

POINT VII

By holding that the amendment of §5(b) does not represent an exercise of the War Powers of Congress, but rather the power to provide for the common defense and general welfare, the Circuit Court decided an important question of Federal law which has not been but should be settled by this Court.

In *Stoehr v. Wallace* (1921), 255 U. S. 239, this Court said at page 241:

"The Trading With the Enemy Act, whether taken as originally enacted * * * or as since amended * * * is *strictly a war measure* and finds its sanction in the constitutional provision, Art. I §8, cl. 11, empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.'"

The amendment of §5(b) now before the Court was contained in Title III of the First War Powers Act, 1941. The fact that the provisions introduced into §5(b) were thus incorporated in the First War Powers Act, and the further fact that they were introduced as an amendment to a section of the statute which this Court had declared to represent an exercise of war powers, strongly suggests that Congress intended the amendment to constitute an exercise of its war powers. If such were the case, the power contained in §5(b) to vest the property of a foreign country or a national thereof must have referred to an enemy foreign country.

The Circuit Court held that the vesting power related to a foreign country whether friend or enemy, and to a national thereof. It was therefore necessary for the Circuit Court to find some other constitutional authority to sustain the Court's construction of the statute. This was done by asserting that the power was derived from the power of Congress to provide for the common defense and general welfare. The Court said in its opinion (R. 64):

“ . . . However, the amendment of 1941 . . . gave power to the President . . . to ‘compel . . . any . . . transfer’ of such property; and as the section expressly covered all property ‘subject to the jurisdiction of the United States’ it included shares of stock in a domestic corporation. *Stoehr v. Wallace*, 255 U. S. 239; *Great Northern Railway Co. v. Southerland*, 273 U. S. 182. The power of Congress to seize and confiscate enemy property rests upon Art. 1 §8 Clause 11 of the Constitution. *Stoehr v. Wallace*, *supra* p. 242; *United States v. Chemical Foundation Inc.*, 272 U. S. 1-11. . . . The amendment of §5(b) must therefore rest upon some other power of Congress, not only for that reason, but

because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared'. It can rest upon Art. 1, §8, Clause 1; i. e., upon the power 'to provide for the common Défense and general Welfare'

The Custodian made no argument before the Circuit Court that §5(b) was intended to implement the power of Congress to provide for the common defense and the general welfare. In the literature on the subject there has been a suggestion that the statute contemplated condemnation (McNulty, *Constitutionality of Alien Property Controls*, XI Law and Contem. Prob. 135-141), but the Circuit Court did not rest the power on eminent domain, probably because §5(b) failed to follow the usual pattern of an eminent domain statute, as argued by Mr. John Foster Dulles (*The Vesting Power of the Alien Property Custodian* (1934) 28 Corn. L. Q. 245-250), and also because some doubt possibly existed as to whether the taking was for a public use in the sense required by eminent domain. In *U. S. v. 243.22 Acres of Land* (1942) 43 F. Sup. 561, affd. 129 F. 2d 676, the same Court affirmed an opinion which stated that the Government may not acquire property where it may be of no benefit to the Government. In the vesting of foreign property it is the act of vesting, which operates to deprive the enemy of the use of the property, that is conceived to be beneficial to the United States. The property itself, frequently becomes a burden rather than a benefit and the carrying charges are imposed upon the property itself instead of being borne by the United States as would be the case if the property were actually a benefit to the Government. Thus, §5(b) as amended does not require that property to be vested shall be for the use of the

United States but merely provides that after vesting has actually occurred, it shall be *held* for the benefit of the United States.

By grounding the statute on any power other than the making of rules concerning captures ~~on land and water~~ the Circuit Court superimposed an entirely different design which cannot be fitted to the permanent sections of the 1917 Act without producing more questions than are solved. To avoid this difficulty is undoubtedly the reason why the Custodian in both the District Court and the Circuit Court argued that §5(b) represented a grant of power separate and independent from but collateral with the permanent sections of the 1917 Act.

The nature of the power that Congress intended to exercise is an important factor in determining how the statute should be construed. This consideration in itself should be sufficient to induce this Court to review the matter and indicate the theory on which §5(b) as amended is to be construed.

POINT VIII

The decision of the Circuit Court that a friendly alien whose property has been taken and whose rights are protected by a treaty of friendship and commerce, may recover compensation in the Court of Claims presents an important Federal question which has not been but should be settled by this Court.

In its opinion the Circuit Court said (R. 67), " . . . it is settled by many decisions . . . that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to

pay just compensation, and that that promise is 'just compensation' under the Fifth amendment."

A promise to pay just compensation is in a large measure worthless if the promisee may not establish the amount thereof and recover judgment in a proper legal proceeding.

Actions on implied promises of the United States may only be brought in the Court of Claims, under the provisions of the so-called Tucker Act. In the very case cited by the Circuit Court (*Yearsley v. Ross* (1940), 309 U. S. 18), this Court said that inasmuch as the property had been taken by the direction of Congress, suit should have been in the Court of Claims under the Tucker Act (§250, Tit. 28 U. S. C.).

The Tucker Act, however, does not authorize suits in the Court of Claims by aliens whose rights are the subject of international treaty. §259, Tit. 28 U. S. C. reads as follows:

"The jurisdiction of the said Court (of Claims) cannot extend to any claim against the Government . . . growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

As pointed out elsewhere herein (*supra*, p. 33), the Treaty of Friendship and Commerce between the United States and Switzerland protects the rights of Swiss subjects and requires that " . . . they shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, No pecuniary or other more burdensome condition shall be imposed . . . upon the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside,

nor any condition whatever to which the latter shall not be subject."

Any proceeding by the Swiss banks to recover just compensation for the expropriation of their rights in the shares described by the vesting order would rest primarily on the Treaty of Friendship and Commerce of 1850. This treaty antedated §259 Tit. 28 U. S. C. which was originally enacted in 1863 (12 Stat. 767; see Historical Note to §259 Tit. 28, U. S. C. A.); and hence, it cannot be said that the treaty has modified the statute. Consequently, the rights of the Swiss banks are dependent upon a treaty, and for that reason the United States Court of Claims does not have jurisdiction to entertain such a proceeding.

Moreover, §7(c) (Appendix, p. 47 *infra*) provides that the sole relief and remedy of a person whose property has been seized shall be that provided by the Trading With the Enemy Act; and in *Becker Co. v. Cummings* (1935) 296 U. S. 74, it was said in the dissenting opinion of Mr. Justice Roberts, concurred in by Mr. Justice Sutherland, in discussing a point as to which the prevailing opinion was not in conflict, at page 84:

"... the express provisions of §7 of the Trading With the Enemy Act, that the sole relief and remedy of any person having a claim under the Act shall be that afforded by the Act, precludes a suit for the property or the proceeds of it under the Tucker Act."

The result is that the Swiss banks do not even have a right to obtain just compensation for the property which will be taken if the decision of the Circuit Court is given effect.

This presents another important question of Federal law which has not been but should be settled by this Court.

Conclusion

For the reasons stated in the petition and in this brief, the application for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE TRADING WITH THE ENEMY ACT

SUBDIVISION 5(b)

as amended by

§301, Title III, First War Powers Act, 1941
C. 593, 55 STAT. 839

(Portion remaining from previous amendment (54 Stat. 179) shown in regular type; deleted matter shown in bracketed black face type, and new matter shown in italics.)

5(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or ~~otherwise~~, and under such rules and regulations as he ~~may~~ prescribe, by means of instructions, licenses or otherwise—

(A) investigate, regulate, or prohibit [under such rules and regulations as he may prescribe, by means of licenses or otherwise] any transactions in foreign exchange, transfers of credit [between or payments by or to banking institutions as defined by the President,] or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, [or] currency or securities, and [any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness, or evidences of ownership of, property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof;]

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, hold-

ing, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President [may] shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof; or relative to any interest in foreign property; or relative to any property in which any [such] foreign [state] country or any national [or political subdivision] thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require [including] the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, [in connection therewith] in the custody or control of such person, [either before or after such transaction is completed.]; and the President may, in the manner hereinabove provided, take other and further meas-

ures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder, shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: PROVIDED, HOWEVER, That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or if a natural person, may be imprisoned for not more than ten years or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Section 7(c) as amended November 4, 1918 (40 Stat. 1020):

7(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

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Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

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Section 7(e):

7(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. * * *

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Section 8(a):

8(a) Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with

law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: PROVIDED, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: PROVIDED FURTHER, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

Section 9(a):

9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian

shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

EXECUTIVE ORDERS

Definition of the word "national" as contained in Executive Order 8389 of April 10, 1940 (Tit. 3, C. F. R. Cum. Sup. p. 646) as amended by Executive Order 8785 of June 14, 1941 (id., p. 950):

• • • • •
5E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this

Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing, control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

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Definition of the word "national" as contained in Executive Order 9193 of July 6, 1942 amending Executive Order 9095 (Tit. 3, C. F. R. Cum. Sup.; p. 1177):

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10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as

amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading With the Enemy Act, as amended.

• • • • •

IN THE
Supreme Court of the United States

October Term 1946

No. 384

**SILESIA AMERICAN CORPORATION, Debtor
and SILESIA HOLDING COMPANY,**

Petitioners,

against

**TOM C. CLARK, Attorney General, as successor to The Alien
Property Custodian,**

Respondent.

BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

GEORGE W. WHITESIDE,
Counsel for Petitioners,
Silesian-American Corporation, Debtor
and Silesian Holding Company.

LEONARD P. MOORE,
WILLIAM GILLIGAN,
Of Counsel.

INDEX

	PAGE
Opinion of the Court Below	1
Jurisdictional Statement	1
Statement of the Case	2
The Question Before the Court	6
Specification of Errors	7
Summary of the Argument	9
Argument	
I. Under §8(a) of the Trading With the Enemy Act the Alien Property Custodian cannot take possession of property held by a friendly alien as pledgee with power of sale	10
II. There is no sound reason for concluding that in amending §5(b) Congress intended to change the provisions of §8(a)	17
Evidence as to Congressional Purpose	22
Intent as Determined by the Rules of Construction	39
III. If the amendment of §5(b) by the First War Powers Act, 1941, has not repealed or modified §9(a) it necessarily follows that §8(a) has not been repealed or modified	54
IV. The exculpatory provisions of §5(b)(2) and §7(e) do not protect the debtor and relieve it from doubt as to possible liability	57
Congress May Not Enact Conclusive Presumptions	61

The Invasion of the Judicial Process	62
As an Attempt to Avoid by Indirection the Result of Unconstitutionality	63
V. The District Court erred in failing to give the Swiss banks an opportunity to prove their rights as pledgees with power of sale	64
VI. The order of the District Court should be re- versed and the District Court should be directed that new certificates for the shares described in Vesting Order 370 may not be issued to the <u>Alien</u> Property Custodian or in the alternative the case should be remanded to the District Court to take further proof to determine whether the Swiss banks are friendly aliens and the said shares are held by the Swiss banks as pledgees within the exemption provisions of §8(a)	66

APPENDIX

The Trading With the Enemy Act

Sec. 5(b)	67
7(c)	70
7(e)	71
8(a)	72
9(a)	73

LIST OF CITATIONS

Cases

Bandier Petroleum Co. v. Superior Court (1931), 284 U. S. 8	62
Bailey v. Alabama (1911), 219 U. S. 219	64
Becker Co. v. Cummings (1935), 296 U. S. 74	44
B. & O. R. Co. v. U. S. (1936), 298 U. S. 349	49, 62
Cheung Sum Shee v. Nagle (1925), 268 U. S. 336	48
Chew Heong v. U. S. (1884), 112 U. S. 539	43
In re Chin A. On (1883), 18 F. 506	43
Draeger Shipping Co. v. Crowley (1943), 49 F. Supp. 215	6
Fairbanks v. U. S. (1901), 181 U. S. 283	64
Frost v. Wenie (1895), 157 U. S. 46	39, 43
Garvan v. \$20,000 Bond (C. C. A. 2nd 1920), 265 F. 477 aff'd 254 U. S. 554	14, 15, 16, 45
Garvan v. \$50,000 Bond (C. C. A. 2nd 1920), 265 F. 477 aff'd 254 U. S. 554	14, 15
Great Northern Ry. Co. v. Sutherland (1927), 273 U. S. 162	61
Grenada County v. Brogden (1884), 112 U. S. 261	44
Heiner v. Donnan (1932), 285 U. S. 312	62, 64
Hunter v. Central Union Trust Co. (D. C., S. D. N. Y. 1926), 17 F. 2d 174	49
The Kaiser Wilhelm II (C. C. A. 3rd 1917), 246 F. 786	66
Kilbourn v. Thompson (1880), 103 U. S. 168	62
Markham v. Cabell (1945), 326 U. S. 404	19, 22
Massachusetts v. Mellon (1923), 262 U. S. 447	62

	PAGE
Panama Refining Co. v. Ryan (1935), 293 U. S. 388	50
Peo. ex rel. Burby v. Howland (1898), 155 N. Y. 270	63
Pigeon River Imp. Co. v. Cox (1934), 291 U. S. 138	43
Plymouth Coal Co. v. Pennsylvania (1914), 232 U. S.	
531	44
Presser v. Illinois (1886), 116 U. S. 252	44
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362	50
Richmond Co. v. U. S. (1928), 275 U. S. 331	30
St. Louis & O'Fallon R. Co. v. U. S. (1929), 279 U. S.	
461	61
St. Joseph Stock Yards Co. v. U. S. (1936), 298 U. S. 38	63
Schächter Corp. v. U. S. (1935), 295 U. S. 495	51
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Silesian American Corporation v. Markham (1946),	
156 F. 2d 793	1
Spreckles Co. v. The Takaoaka Maru (S. D. N. Y. 1942),	
44 F. Supp. 939	66
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N. E. 88	63
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255 U. S. 239	5, 17, 22
Thoe v. Chicago M. & St. P. Ry. Co. (1923), 181 Wis.	
456, 195 N. W. 407	62
Tot v. U. S. (1943), 319 U. S. 463	62
Uebersee Finanz-Korporation v. Markham (1946), 158	
F. 2d 313	20, 54
U. S. v. Burroughs (1933), 289 U. S. 159	40
U. S. v. Carolene Products Co. (1938), 304 U. S. 144	62
U. S. v. Greathouse (1897), 166 U. S. 601	40
U. S. v. Healey (1895), 160 U. S. 136	40
U. S. v. Klein (1871), 80 U. S. 128	62

U. S. v. Lee Yen Tai (1902), 185 U. S. 213	40
U. S. v. Payne (1924), 264 U. S. 446	43
U. S. v. Von Clemm (C. C. A. 2d 1943), 136 F. 2d 968 ...	52
U. S. v. Walter (1923), 263 U. S. 15	40
Watts v. Unione Austriaca, etc. (1918), 248 U. S. 9 ..	66
Western & Atlantic R. Co. v. Henderson (1929), 279 U. S. 639	61

Statutes, Regulations, etc.

40 Stat. 415	29
40 Stat. 418	11, 71
40 Stat. 518	30
40 Stat. 705	30
40 Stat. 966	29
40 Stat. 1020	70
41 Stat. 977	73
48 Stat. 1	18
52 Stat. 855, 883, 885	2
52 Stat. 890	2, 7
52 Stat. 893	65
53 Stat. Pt. 2 1748-1772	43
54 Stat. 179	18, 30, 67
54 Stat. 892, 1090	31
55 Stat. 242	31
55 Stat. 742	31
55 Stat. 839	67
56 Stat. 177	31
Bankruptcy Act §47 (52 Stat. 855)	2
Chandler Act §121 (52 Stat. 885)	1
Chandler Act §167(5) (52 Stat. 890)	2, 7
§196 (52 Stat. 893)	65

Judicial Code §240(a) (28 U. S. C. §347)	2
N. Y. Personal Property Law §174	64
Trading With the Enemy Act:	
§2	21, 52
§3	21
§5(b) (see Appendix, p. 67)	4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 23, 29, 30, 31, 32, 33, 36, 38, 39, 40, 41, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 67
§6	17, 19, 29
§7(b)	21
§7(c) (see Appendix, p. 70) ...	5, 8, 12, 13, 17, 19, 33, 35, 36, 41, 45, 46, 49, 57, 70
§7(e) (see Appendix, p. 71)	8, 9, 17, 57, 58, 59, 60, 61, 71
§8(a) (see Appendix p. 72)	4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 33, 38, 39, 40, 46, 51, 55, 56, 57, 62, 66
§8(b)	22
§8(c)	22
§9(a) (see Appendix, p. 73)	5, 6, 9, 17, 19, 20, 21, 22, 32, 33, 35, 36, 38, 39, 40, 41, 44, 45, 47, 54, 55, 56
§10	17, 19
§11	17
§12	17, 19
§16	21
Tucker Act, 24 Stat. 505, superseded by 36 Stat. 1137	
§145 seq.	5, 45, 46
Uniform Stock Transfer Act §13	64

United States Code,

Title 11,

§47	2
§521	2
§567(5)	7
§596	65

Title 28,

§250	8, 46
§259	5, 8, 46
§261	5, 46
§347	2

Title 35,

§68	30
-----------	----

Title 50,

§171	30
§171(a)	31
§309	31
§721	31
§1271-75	31

United States Code Annotated, Title 50, p. 210	49
--	----

p. 237	11
--------------	----

p. 238	21
--------------	----

Executive Order 8389 (3 C. F. R. Cum. Supp. p. 645)	3, 18, 30
---	-----------

Executive Order 8785 (3 C. F. R. Cum. Supp. p. 948)	18, 30
---	--------

Code of Federal Regulations, Cumulative Supplement,

Title 3 pp. 657-674, 687, 689, 796, 904, 910, 917, 929, 948	18
---	----

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Hearings Before Sub-Committee of the Committee on Commerce, U. S. Senate, 65th Cong., 1st Sess., on H. R. 4960	12
Hearings Before a Sub-Committee of the Committee on the Judiciary, U. S. Senate, 79th Cong., 2d Sess., on S. 2378	35
Hearings Before Sub-Committee No. I, Committee on the Judiciary, House of Rep., 79th Cong., 2d Sess., on H. R. 5089	34, 44, 47
Senate Report 1839, 79th Cong., 2d Sess.	32, 36
House Report 1507, 77th Cong., 1st Sess.	30
House Report 2398, 79th Cong., 2d Sess.	35
S. 526, 79th Cong., 1st Sess.	32, 52
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H. R. 6206, 77th Cong., 1st Sess., 1941	23
H. R. 6233, 77th Cong., 1st Sess., 1941	23
H. R. 4840, 78th Cong., 2d Sess.	32, 52
H. R. 5031, 78th Cong., 2d Sess.	32, 52
H. R. 1530, 79th Cong., 1st Sess.	32, 52
H. R. 5089, 79th Cong., 2d Sess.	32, 33
H. R. 6890, 79th Cong., 2d Sess.	34, 35, 36
87 Cong. Rec. Pt. 9, pp. 9789, 9837, 9838	27
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87 Cong. Rec. Pt. 9, pp. 9858, 9859	24
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92 Cong. Rec. Pt. 8, p. 10218	32, 37
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* Duke University Law School.

IN THE
Supreme Court of the United States

October Term 1946

No. 364

**SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,**

Petitioners,

against

**TOM C. CLARK, Attorney General, as successor to The Alien
Property Custodian,**

Respondent.

**BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF OF PETITIONERS

Opinion of the Court Below

The opinion in the Circuit Court of Appeals for the Second Circuit has been reported at 156 F. (2d) 793 and also appears in the certified copy of the Transcript of Record (R. 63 seq.). The opinion of the District Court also appears in the transcript (R. 49):

Jurisdictional Statement

The basis upon which it is contended that this Court has jurisdiction to review the order of affirmance are the provisions of Sec. 121 of the Chandler Act (52 Stat.

885; 11 U. S. C. §521); the provisions of §47 of the Bankruptcy Act (52 Stat. 855; 11 U. S. C. §47), and §240(a) of the Judicial Code (28 U. S. C. §347).

Statement of the Case

The Silesian American Corporation is a Debtor in a proceeding for reorganization of a corporation under the Chandler Act (52 Stat. 883), and the Silesian Holding Company is the owner of more than half of all the outstanding preferred and common shares of the Silesian American Corporation.

The Debtor is a Delaware Corporation whose corporate structure is set forth in the petition filed with the District Court (R. 5). For many years 50,000 shares of Debtor's 7% cumulative non-voting preferred stock (41.67%) with a par value of \$5,000,000, and 98,000 shares of its common stock (49%) without par value but with a stated value of \$490,000, were registered in the name of a Swiss corporation briefly referred to as "Non-Ferrum" (R. 6). This latter corporation was included in the list of blocked nationals revised February 7, 1942 (R. 6).

Debtor's income being derived from sources in Europe, was interrupted by the war and Debtor was consequently unable to meet obligations on a bond issue which matured August 1, 1941 (R. 40 and 41). Petition herein was therefore filed and trustees appointed July 30, 1941 (R. 34 to 39). In his report under §167 (5) of the Chandler Act (52 Stat. 890), the trustee found that the Debtor's shares registered in the name of Non-Ferrum had been pledged as security for loans of several millions of dollars made by certain Swiss banks and banking houses (R. 41) under the leadership of La Roche & Co. of Basle,

Switzerland (R. 47). In June, 1941, these Swiss banks were willing to lend to the Debtor substantial funds to meet its maturing obligations but the Treasury Department would not license this transaction (R. 41), despite the facts that in the several proceedings before the Treasury the interests of the Swiss banks were clearly established and the banks were not included in the so-called "black-list" nor was there any suggestion that they were inimical to the United States (R. 7).

Hence, this is not a case where the Alien Property Custodian issued a vesting order covering the described shares without knowing that they were held by friendly aliens as pledgees.

In November 1942, the Alien Property Custodian disregarding the non-enemy interest of the Swiss banks and their status as pledgees and disregarding also the fact that the shares were frozen under Executive Order 8389, issued a vesting order upon a finding that the shares registered in the name of Non-Ferrum were property of "a national of a designated enemy country (Germany)" and "determining that to the extent that any or all such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of the aforesaid enemy country * * *" (R. 14). The order did not mention or express any intention to vest the interests of the Swiss banks.

In February 1943 the Custodian demanded that the Debtor cancel on its books the certificates issued to Non-Ferrum and issue new certificates in the name of the Custodian (R. 16). The outstanding certificates were held by the Swiss banks and their attorney thereupon notified the Debtor that if such new certificates were issued, the Debtor

would act at its peril (R. 27). The order appointing trustees contains no provision authorizing the issuance by the Debtor of any certificates (R. 34 to 39).

§8(a) of the Trading With the Enemy Act of 1917 provides that a pledgee of enemy property with power of sale who is not an enemy or ally of enemy may retain possession of the property, and the history of this section in Congress showed that it was not intended that the Alien Property Custodian could summarily take possession of enemy property in the hands of a friendly pledgee. The amendment to §5(b) contained in the First War Powers Act, 1941, authorized the vesting of property of a foreign government or national thereof, but did not repeal or nullify this provision of §8(a). Furthermore, if §5(b) be regarded as an wholly independent method for seizing foreign property, it was unconstitutional. In addition there were numerous other questions as to the meaning of the applicable statute and the effectiveness of the procedure resorted to by the Alien Property Custodian thereunder.

The Debtor therefore obtained an order directing that cause be shown why the District Court should not instruct the Debtor under the circumstances (R. 3). A motion, originally returnable May 12, 1943 (R. 3), was adjourned from time to time until June 26, 1945, when it was argued at length, and thereafter an order was made under date of October 30, 1945, directing the Debtor to cancel on its books and records all evidence showing that the described shares are owned by Non-Ferrum, and requiring the Debtor to issue and deliver to the Alien Property Custodian new certificates representing the said shares (R. 50).

An appeal to the Circuit Court of Appeals for the Second Circuit was promptly taken by the Debtor (R. 52) and

also by its majority stockholder the Silesian Holding Company (R. 60). The notice of appeal was served upon all parties entitled to notice in the reorganization proceedings. Only the Alien Property Custodian filed a brief and appeared in opposition at the hearing. The appeal was argued on June 5th and the Circuit Court of Appeals affirmed the order of the District Court on July 3rd, 1946, with an opinion by Judge Learned Hand (R. 63 seq.).

Judge Hand arrived at this conclusion by (1) holding that §5(b) represented an exercise by Congress of its power to provide for the common defense and general welfare, despite the fact that this Court had said in *Stoehr v. Wallace* (1921) 255 U. S. 239-241, that the Trading With the Enemy Act was strictly a war measure and represented an exercise by Congress of its power to declare war and make rules concerning captures on land and sea; (2) developing a theory for delegation of legislative power quite beyond anything heretofore enunciated by this Court; (3) holding that friendly aliens do not have the same rights as American citizens to recover vested property thus violating existing treaties; (4) holding that a friendly alien whose property has been appropriated may recover just compensation in the Court of Claims under the Tucker Act, despite the provisions of 7(c) of the Trading With the Enemy Act that the sole relief and remedy of any person having any claim to money or property seized by the Custodian should be the remedy provided by §9(a), and also despite the provision of §259 Tit. 28 U. S. C., denying to the Court of Claims jurisdiction of claims dependent on a treaty, and also §261 of the same Title denying jurisdiction to an alien whose government does not provide a reciprocal right to American citizens; (5) holding that the express provi-

sions of §8(a) must be disregarded because they cannot be rationalized with the rest of the opinion; and (6) disregarding the assumption expressed by this Court that "where Congress amends only one section of a law leaving another untouched, the two were designed to function as parts of an integrated whole".

In his opinion Judge Hand indicated a serious misapprehension of petitioner's argument when he said (R. 67), "It so chanced that both the Debtor and the Custodian take the position that a friendly alien may not sue under §9(a)". The petitioners did not take this position, but argued that if the construction placed upon §5(b) by the Custodian is correct, then a friendly alien cannot recover vested property, and as so construed the statute is unconstitutional.¹

The Question Before the Court

The primary question before the Court is whether in view of the provisions of §8(a) of the Trading With the Enemy Act of 1917 exempting pledged property from seizure, the Alien Property Custodian can take possession of shares of stock held by friendly aliens as pledgees with power of sale.

¹ At page 10 of petitioners' brief in the Circuit Court of Appeals it was said, "If §5(b) as amended is held constitutional, such a result can only be arrived at on some theory whereby the 'permanent' sections of the 1917 statute operate to sustain such constitutionality, as occurred in *Draeger Shipping Co. v. Crowley* (1943) 49 F. Supp. 15 * * *", and on page 27, "Thus, according to the Alien Property Custodian, the Attorney General, and the District Court of the United States, so far as the rights of friendly aliens are concerned, no measure of due process is provided by §9(a) of the 1917 statute because a friendly alien is not entitled to bring a proceeding under §9(a) if its property was vested under 5(b)."

As a corollary is the question whether the District Court, having the Debtor in its custody in a reorganization proceeding under the Chandler Act, should cause the officers of the Debtor to issue new and unrestricted certificates to the Alien Property Custodian for shares having a value of several million dollars when the said shares and the original certificates representing them are claimed to be held by such Swiss banks, who are friendly aliens, as pledgees with power of sale, and the trustee of the Court under Sec. 167(5) of the Chandler Act (52 Stat. 890; 11 U. S. C. §567(5)) has reported facts substantiating such claims.

Specification of Errors

1. The Circuit Court erred in failing to hold that under the provisions of §8(a) a friendly alien holding enemy property as pledgee with a power of sale may retain possession of such property as against the demand of the Alien Property Custodian.

2. The Circuit Court erred in holding that after the amendment of §5(b) by the First War Powers Act 1941, §8(a) could no longer protect the possession of friendly alien pledgees.

3. The Circuit Court erred in holding that a friendly alien stands in a position different from a citizen whose property has been seized.

4. The Circuit Court erred in holding that a friendly alien whose property has been seized by the Alien Property Custodian is justly compensated by an implied promise to pay just compensation.

5. The Circuit Court erred in failing to hold that the provisions of §250 Tit. 28 U. S. C. whereby suit may be brought against the United States in the United States Court of Claims for property taken, are not available to the Swiss banks because their rights rest primarily on a treaty of friendship between Switzerland and the United States and §259 Tit. 28 U. S. C. deprives the United States Court of Claims of jurisdiction when the claim is dependent on a treaty.

6. The Circuit Court erred in failing to hold that §7(c) of the Trading With the Enemy Act precludes any relief or remedy to a person whose property has been seized except that provided by the said Act.

7. The Circuit Court erred in failing to hold that the power exercised by Congress in authorizing the President to vest the property of any foreign country or national thereof was the same power that had been exercised in enacting the Trading With the Enemy Act of 1917.

8. The Circuit Court erred in holding that the power exercised by Congress in amending §5(b) of the Trading With the Enemy Act with respect to the vesting of foreign property was the power to provide for the common defense and promote the general welfare.

9. The Circuit Court erred in failing to hold that the exculpatory clauses of §5(b) and §7(e) are unconstitutional as representing attempts to establish by statute conclusive presumptions.

10. The Circuit Court erred in failing to hold that §5(b) and §7(e) are unconstitutional as representing attempts to invade the judicial process.

11. The Circuit Court erred in holding that under §9(a) a friendly alien would have the formal capacity to sue because he is not an enemy or ally of enemy, whereas the Court holds that under §8(a) he would not have the formal capacity to retain possession of pledged property.

12. The Circuit Court erred in assuming that the vesting order of the Alien Property Custodian was a valid and effective order so far as the interests of the Swiss banks are concerned.

13. The Circuit Court erred in failing to hold that §5(b)(2) and §7(e) do not protect the Debtor and relieve it from doubt as to possible liability.

14. The Circuit Court erred in affirming the order of the District Court.

Summary of Argument

I. Under §8(a) of the Trading With the Enemy Act the Alien Property Custodian cannot take possession of property held by a friendly alien as pledgee with power of sale.

II. There is no sound reason for concluding that in amending §5(b) Congress intended to change the provisions of §8(a).

III. If the amendment of §5(b) by the First War Powers Act, 1941, has not repealed or modified §9(a), it necessarily follows that §8(a) has not been repealed or modified.

IV. The exculpatory provisions of §5(b)(2) and §7(e) do not protect the debtor and relieve it from doubt as to possible liability.

V. The District Court erred in failing to give the Swiss banks an opportunity to prove their rights as pledgees with power of sale.

VI. The order of the District Court should be reversed and the District Court should be directed that new certificates for the shares described in Vesting Order 370 may not be issued to the Alien Property Custodian or in the alternative the case should be remanded to the District Court to take further proof to determine whether the Swiss banks are friendly aliens and the said shares are held by the Swiss banks as pledgees within the exemption provisions of §8(a).

POINT I

Under §8(a) of the Trading With the Enemy Act the Alien Property Custodian cannot take possession of property held by a friendly alien as pledgee with power of sale.

By reason of the provisions of §8(a) the petitioners claim that the Custodian is not legally authorized summarily to take possession of shares held by friendly aliens as pledgees with power of sale. The trustee appointed by the Court reported to the Court the existence of such liens before the United States entered the war. The claim of the Swiss banks that they hold these certificates and the shares represented thereby as collateral security for a very substantial loan has never been disputed (p. 41).

In enacting the Trading With the Enemy Act of 1917 Congress specifically anticipated a situation wherein enemy property would be held by a non-enemy as collateral security for a loan, and Congress expressly reserved to the non-

enemy the right to retain possession of such property, and granted to the Alien Property Custodian only the right to receive the equity therein.

§8(a) reads as follows (40 Stat. 418; 50 U. S. C. A., p. 237):

“ . . . Any person not an enemy or ally of enemy holding a lawful mortgage, pledge or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, . . . may continue to hold said property, and, after default may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally; *provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which by law or by the terms of said instrument or contract, ~~no~~ notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required; *provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may pre-

scribe, and such surplus shall be held subject to his further order."

From this statute it clearly appears that under the 1917 Act a pledgee with power of sale who is not an enemy or ally of enemy was entitled to continue to hold the pledged securities and the interest of the Custodian was confined to the equity of the enemy, that is to say, to the surplus proceeds from any sale. §8, above quoted, can only mean that where friendly aliens hold possession of certificates as pledgees representing shares originally issued to aliens believed to be enemy, the Alien Property Custodian cannot disregard the rights and interests of the pledgees and require the issuing corporation to cancel on its books the evidence of ownership of the shares held by such pledgees and to issue to the Custodian new certificates representing the shares held by the friendly aliens as pledgees.

• §8(a) was deliberately inserted in the statute by Congress for the purpose of limiting the power of seizure granted to the Custodian under §7(c).

The history of §8(a) clearly demonstrates that Congress intended to withhold from the Custodian the power summarily to take into his possession securities held by non-enemy pledgees. This appears conclusively from a perusal of the *Hearings before the Sub-committee of the Committee on Commerce, U. S. Senate, 65th Congress, 1st Session, on H. R. 4960*, which was the original draft of the Trading With the Enemy Act. The bill as introduced contemplated that the Secretary of Commerce should act in the position ultimately assigned to the Alien Property Custodian, and §8 provided that a non-enemy pledgee might dispose of its securities under such rules and regulations and after such notice as the Secretary of Commerce, with the approval of

the President might prescribe (*id.*, p. 15, lines 16, *et seq.*). The N. Y. Stock Transfer Association caused its representative to appear before the Sub-Committee and urge several amendments, the fifth of which proposed the insertion in §8 of the words "continue to hold the same and" so as expressly to provide that a non-enemy pledgee "• • • may continue to hold the same and after default dispose of such property • • •". The purpose of this proposed amendment was explained as follows (*id.*, p. 59):

"This amendment is proposed in order to make clear what we believe to be the real meaning of section 8 and to remove a doubt which might otherwise arise whether the provisions of section 8 were not to a certain extent in conflict with the provisions of section 7(c). As the act now stands, it might be interpreted as safeguarding the mortgagee, pledgee, or lienor only if and to the extent that the Secretary of Commerce should refrain from exercising in respect to the mortgaged or pledged property the powers conferred by section 7(c), whereby he may require that property or money owing to or belonging to enemies shall be transferred and delivered to the alien property custodian. We do not believe that this is the intent of Congress, • • • to deprive a citizen of the United States of the possessory rights which he shall have at the time of the passage of this act as an incident to his mortgage, pledge, or lien. But as the act now stands, we know that in many quarters it has created a sense of uneasiness and insecurity. This will be removed by the adoption of the proposed amendment."

Assistant Attorney General Warren, who prepared the original bill, informed the Committee that he believed the amendment desirable (*id.*, p. 160; see also p. 185).

The obvious intention of Congress was, that where shares registered in the name of stockholders believed to be enemies were actually held by non-enemy pledgees as security, the Custodian could not summarily take possession of such securities.

This Court approved such a construction of the statute in 1920. In *Garvan v. \$20,000 Bond* (CCA 2nd 1920) 265 F. 477 aff'd 254 U. S. 554, certain German insurance companies, in compliance with state laws, deposited securities with trustees who were to hold the securities primarily for the purpose of paying the claim of any policy holder admitted to be due by the company or established by the claimant in due course of law, and secondarily for the benefit of the companies. The Alien Property Custodian libeled these securities, as being enemy property, and the trustees urged that they were entitled to retain the securities under the provisions of §8. In disposing of the trustees' argument that they were lien holders entitled to the protection of §8, the Circuit Court of Appeals said at page 480:

"We do not think that the trustees claimants are mere lien holders under section 8 of the act, and as such to be *entitled to retain possession of the property in question*; they are, as stated above, trustees with an active duty, and not lien holders, within the meaning of the section at all. *It clearly protects the lienholders, and especially the vast amount of loans against collateral, any interference with which would cause great injury to banks, trust companies and stockbrokers, and produce disturbance of business generally.*" (Italics supplied)

In a connected case which came before the Circuit Court of Appeals for the Second Circuit at the same time *sub nomine Garvan v. \$50,000 Bond* the opinion of Judge A. N.

Hand in the District Court, which was unreported, but which may be found in the record on appeal at folio 432 *et seq.* said at folio 450:

"... the section as finally enacted preserved the remedies of lienors, but only in a limited class of cases where the 'mortgage, pledge or lien or other right in the nature of security in property of an enemy or ally of enemy' was one 'which by law or by the terms of the instrument creating such mortgage, pledge or lien, or right, may be disposed of on notice or presentation or demand' (Section 8a). ... Disturbance of bank loans, secured by collateral, by any novel mode of liquidation and interference with foreclosure of ordinary mortgages might have seriously interfered with normal financial operations by American citizens. Consequently the Act was re-drafted so as to allow such liens to be enforced in the customary way. ... If the Custodian was not entitled to possession of pledged property not within this provision, what was the purpose or need of the provision?"

The decision of the District Court in *Garvan v. \$50,000 Bond* was affirmed by the Circuit Court of Appeals in the decision reported *sub nomine Garvan v. \$20,000 Bond* (*supra*).

The fact that Congress had withheld from the Custodian the power summarily to seize enemy property pledged with a person who is not an enemy or ally of enemy was implicitly conceded in the briefs submitted on behalf of the Alien Property Custodian when both of the above mentioned cases were argued before the Circuit Court of Appeals.

No case has been found arising out of World War I in which the Alien Property Custodian attempted to seize

pledged securities concededly held within the provisions of section 8(a). As appears from the group of cases represented by *Garvat v. \$20,000 Bond* (*supra*) if the Custodian believed that he was entitled to possession of securities held by non-enemies who claimed to be pledgees, the practice was for the Custodian to libel the property and thus to obtain an adjudication of his rights.

Judge Learned Hand in his opinion below conceded that if §5(b) as amended by the First War Powers Act, 1941, did not modify §8(a), a friendly alien as pledgee with power of sale would be entitled to retain enemy property held by him as collateral security. In his opinion Judge Hand said (p. 67):

"It is true that in the original Act, §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; and, for the argument, we will assume that it forbade disturbing the possession of any pledgee who was not himself an enemy or ally of an enemy. * * *"

Therefore, the Swiss banks, holding the shares under an agreement of pledge whereby the shares could be disposed of on notice or presentation or demand, were entitled to retain possession of the same, and the Alien Property Custodian did not have any power to demand that he be given possession of these shares through delivery to him of unrestricted certificates representing the same.

The question therefore arises as to what effect if any the amendment of §5(b) by the First War Powers Act, 1941 had on the provisions of §8(a).

POINT II

There is no sound reason for concluding that in amending §5(b) Congress intended to change the provisions of §8(a).

The Trading With the Enemy Act of 1917 as originally enacted contained several sections designed to provide for the seizure of enemy property. §6 established the office of the Alien Property Custodian to receive such property; §7 outlined the methods of seizure and the incidents thereof; §8 exempted from seizure property pledged or mortgaged to a non-enemy; it also dealt with contracts in which one of the parties was an enemy, and suspended the Statute of Limitations; §9 provided for the recovery of property mistakenly seized; §10 dealt with enemy patents and trademarks and §12 prescribed the manner in which the Alien Property Custodian should deal with enemy property seized, and authorized the return of property as provided in §9. §11 related to the importation of property, and represented a prohibition rather than a power to seize. All of these sections except 11 were definitely intended to reflect the power of Congress to seize enemy property in time of war.

On the other hand, §5(b) of the original statute was not related to the seizure of property but authorized the President to regulate foreign exchange, monetary metals and transfers of securities between the United States and "any foreign country whether enemy, ally of enemy or otherwise." One would gather from the statement made in *Stoehr v. Wallace* (1921), 255 U. S. 239-241, that this also represented an exercise of the war power.

In any event, when President Roosevelt in 1933 sought authority to arrest the outflux of gold from the United States which was then in progress, recourse was had to the provisions of §5(b) and the action taken was ratified when Congress shortly thereafter amended §5(b) so as to remove any doubt as to its applicability (48 Stat. 1).

Upon the invasion of Norway the President desired to regulate foreign property so as to protect it from the Germans, and §5(b) was again resorted to through the issuance of Executive Order 8389 (3 C. F. R. Cum. Supp., p. 645). Shortly thereafter, §5(b) was further amended in a minor way but the amendment contained a provision ratifying and approving the Executive Order and the regulations that had previously been issued (54 Stat. 179). Executive Order 8389 was amended from time to time with each new German aggression (3 C. F. R. Cum. Supp., pp. 657, 674, 687, 689, 796, 904, 910, 917, 929), and it was generally revised and broadly expanded by Executive Order 8785 issued June 14th, 1941 (3 C. F. R. Cum. Supp., p. 948), which contained numerous provisions not found in the earlier orders.

When, following Pearl Harbor, §5(b) was again amended by the First War Powers Act, 1941, the power to regulate foreign property was generally extended. In addition, there was inserted in the text, "and any property or interest of a foreign country or national thereof shall vest, when, as and upon the terms directed by the President" In this manner Congress imported into §5(b) the exercise of a power to seize foreign property, whereas previously the subdivision had only authorized its regulation. It should be noted that in this amendment Congress did not ratify and approve all that had been previously

done by the Executive but only such orders and regulations as would have been authorized if the amendments had been in effect.

By introducing this power to vest as a part of §5(b) it was necessarily co-related to the rest of the Trading With the Enemy Act, and yet there nevertheless arose a question as to whether Congress in providing for the vesting of foreign property was exercising its war powers as expressed in §§6, 7, 8, 9, 10 and 12 of the Act or whether the vesting power represented the exercise of an entirely different constitutional power and set up a statute separate and apart from the old Act and to be administered as an autonomous statute. The office of the Alien Property Custodian was disposed to construe the statute as autonomous in its nature (see McNulty, *Constitutionality of Alien Property Controls*, XI Law and Contemp. Probs., 135; *Annual Report, Alien Property Custodian, June 30, 1943*, p. 150, where only §5(b) is set forth as the statute under which the Custodian was operating). A contrary view was expressed by an eminent authority on the subject who proposed that the vesting power granted by 5(b) was, because of its incorporation in that section, merely regulatory in its nature. (John Foster Dulles, *The Vesting Power of the Alien Property Custodian*, 28 Corn. L. R. 245.)

The question first came before this Court obliquely in *Markham v. Cabell* (1945) 326 U. S. 404 and the decision in that case eliminated the argument that the vesting power of §5(b) was to be construed as an autonomous and independent statute. This was a necessary result of the holding that the Trading With the Enemy Act of 1917 automatically went into effect again at the outbreak of war and that §9(a) was still to be given effect, in connection with which deci-

sion the Court further stated that there was no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §9(a), and that the normal assumption is that where Congress amended only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.

With these considerations as a background, it is desirable to examine the evidence as to whether Congress by introducing into §5(b) a power to vest foreign property, intended to exercise its war power with respect to enemy property, or contrary to long-standing American policy, in violation of existing treaties, in conflict with existing statutes, and in a manner unconstitutional according to previously declared standards, intended to deal with all foreign property, enemy, ally of enemy or otherwise.

A question as to what effect §5(b) has had on the permanent sections of the Act also arose in *Uebersee Finanz-Korporation v. Markham* (1946) 158 F. 2d 313. There again the question related to §9(a) which provided that a person not an enemy or ally of enemy could recover possession of property vested by the Custodian. The Custodian argued in effect that §5(b) had obliterated the words "enemy or ally of enemy" from §9(a) and had substituted in their place "foreign country or national thereof". In the case at bar §8(a) provides that a person not an enemy or ally of enemy may retain possession of pledged property and the question again is whether §5(b) has obliterated the words "enemy or ally of enemy" and substituted in their place "foreign country or national thereof". Essentially the same question is presented in both cases.

In the *Uebersee* case Mr. Chief Justice Groner concluded that Congress did not intend to obliterate from §9(a) the words "enemy or ally of enemy" because to resolve the

problem in this manner would require a major job of statutory reconstruction and raise grave doubts as to the constitutionality of §5(b). An examination of the entire statute readily discloses what Mr. Chief Justice Groner had in mind concerning the job of statutory reconstruction. In the Trading With the Enemy Act of 1917 as it existed at the close of World War I the phrase "enemy or ally of enemy" was used 66 different times as a noun phrase and 14 different times as an adjective phrase modifying a noun, as for example, in §8(c) where reference is made to "enemy or ally of enemy country" (50 U. S. C. A., p. 238). If the effect of §5(b) was to obliterate these words from §8(a) and §9(a) it would logically follow that a similar change should be made wherever the words "enemy or ally of enemy" elsewhere appeared in the statute. Aside from the fact that these changes would be contrary to the meaning of the words "enemy or ally of enemy" as defined in §2, the construction would lead to somewhat unexpected results. Thus under §3(a) it would be unlawful for a unlicensed person to trade with any other person with knowledge or reasonable cause to believe that such other person is a *foreign country or national thereof*. §3(d) if so changed would make it unlawful for any person to send a letter directly or indirectly to a *foreign country or a national thereof*. Consequently, during World War II it would have been unlawful to trade or communicate with Canada under the severe penalty contained in §16.

By the provisions of §7(b) if changed so as to substitute "foreign country or national thereof" for "enemy or ally of enemy", no person would by virtue of any assignment, etc. of any debt etc. by, from or on behalf of any *foreign country or national thereof* have any right or remedy against the debtor.

Under §8(b) if so changed any contract entered into prior to the beginning of the war with any citizen of the United States and a *foreign country or national thereof* could be abrogated by any citizen who was a party thereto.

Under §8(c) if so changed the running of any statute of limitations would be suspended with reference to the rights or remedies on any contract entered into prior to the beginning of the war between parties not *foreign governments or nationals thereof* and containing any promise to pay which is evidenced by drafts drawn against funds "in any enemy or ally of enemy country" until after the end of the war.

In addition to these difficulties, there are the constitutional considerations referred to by Mr. Chief Justice Groner and hereafter discussed. Not the least of these is the fact that an entirely different theory for the exercise of Congressional power must be found to justify the expropriation of ~~alien property~~ which does not belong to an enemy or ally of enemy. In *Stoehr v. Wallace* (1921) 255 U. S. 239, this court indicated that the power to seize enemy property contained in the Trading With the Enemy Act of 1917 was founded on the war power of Congress to confiscate enemy property. The war power of Congress cannot be used for expropriating the property of friendly aliens. Can it be assumed that Congress in amending a subdivision of a single section of the statute intended to transform the other provisions of the statute so as to reflect the exercise of an entirely different power?

Evidence as to Congressional Purpose

If we commence with the postulate adopted by this court in *Markham v. Cabell* (1945), 326 U. S. 404, that in amending §5(b) Congress did not intend to delete or nullify §9(a),

and that where Congress amended only one section of a law leaving another untouched, the two were designed to function as parts of an integrated whole, there is much in the history of §5(b) which suggests that Congress did not intend to exercise a different constitutional power or to substitute the phrase "foreign country or national thereof" in place of "enemy or ally of enemy" where these words appear in the old statute.

Immediately after Pearl Harbor the Attorney General submitted to Congress H. R. 6206 (77th Cong. 1st Sess. 1941) which simply re-enacted all the provisions of the Trading With the Enemy Act. The Judiciary Committee rewrote this bill and introduced the revision as H. R. 6233. The situation was described by Representative Michener (of the Rules Committee) as follows (87 *Cong. Rec.*, Pt. 9, p. 9856):

"The original bill was what we commonly call a 'shotgun' measure. No one can tell by reading that bill what it means, what it covers, what powers are given, and to whom. It attempts to *revive* legislation once enacted by the Congress but which has expired by limitation of time or which has been expressly repealed. The Committee on the Judiciary felt it necessary to rewrite the bill so that anyone reading it might have some idea as to what was intended by the bill." (Italics supplied)

The proceedings definitely show that the purpose of Congress was not to create a statute based on an entirely new and different theory of Congressional power, but substantially to revive the same statute as had been enacted in 1917.

When the bill came before the house the discussion disclosed much confusion as to the manner in which the

different members understood its provisions, but the dominant purpose clearly was substantially to restore the powers granted to the Executive during World War I, as appears from the following passages (87 Cong. Rec., Pt. 9):

By Representative Fish (*idem*, p. 9856): " . . . This bill merely gives the President the same powers that were given to Woodrow Wilson in the last war . . .

"Title III deals with the Trading With the Enemy Act, the old Trading with the Enemy Act, with certain additional powers giving the President control over communications with foreign nations, *also giving the President the power to use property of the enemy that we may confiscate*. In the last war the President could confiscate every (sic) property but we were not able to use it to our own advantage. This bill gives him that additional power. . . ." (Italics supplied)

By Representative Sumners, Chairman of the Judiciary Committee (*idem*, p. 9858):

" . . . This bill attempts to bring into one legislative enactment what is regarded to be those provisions of the Overman Act and Trading with the Enemy Act, which it is required to legislate relative to now."

And further (*idem*, p. 9859):

"Mr. Robison of Kentucky: Under the provisions of the Trading With the Enemy Act and the alien property custodian features under the old law, they could just take over property, securities, plants, and so forth, and hold them; but under the provisions

we are now considering the Government cannot only take them over and hold them but can use them as well.

"Mr. Kean: I do not believe this refers to foreign securities only, but might be construed to refer to securities held by anybody in the United States.

"Mr. Sumners of Texas: I do not believe so. *This is simply a section dealing with alien enemies.* (Italics supplied)

"Mr. Kean: If it deals with alien enemies, I think it is perfectly all right.

"Mr. Sumners of Texas: *I believe there is no doubt about that.* (Italics supplied)

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"Mr. Jenkins of Ohio: The gentleman may have covered the point I am about to ask him for; I was not here when he started. Has the gentleman covered the main differences between this bill and the powers granted to President Wilson in the first World War?

"Mr. Sumners of Texas: I made the general statement that I believed for all practical purposes we may say there is no substantial difference. Some modifications have been made that were deemed necessary. Guided by experience certain modifications have been made, but I believe I can state generally and that the members of the Committee will generally agree, that there is no substantial difference between the provisions of this bill and the similar grants of power in the Overman Act and the Trading With the Enemy Act.

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"Mr. Jenkins of Ohio: I have the most profound respect for the gentleman and his committee but have wondered whether there was any controversy at all over this bill. The reason I am asking these ques-

tions is so that if I am asked about the bill I will know something about it, and want to say that the great Judiciary Committee of the House considered it and unanimously agreed on its report.

"Mr. Sumners of Texas: The Committee on the Judiciary did examine the bill. We recognize that it was a technical matter and pretty difficult for us to know all the details. *The committee was largely persuaded by the discovered facts, the recognized facts, that there is no substantial difference insofar as the committee could discover between the powers we propose to grant to this President and the powers which President Wilson had. That is about as much as I can say.*" (Italics supplied)

Following these remarks, there was considerable discussion as to the extent to which the bill affected other than alien property, i.e., domestic property.

Representative Gwynne (a member of the Judiciary Committee) after reviewing his understanding of Title III, referred to the power to vest the property of any foreign nation or national, and concluded (*idem*, p. 9862):

"* * * this is the principal difference between this law and the one we had during the last war—the *President may hold and use—that is the new part—or sell such property for the benefit of the United States.*" (Italics supplied)

Representative Springer, in explaining why he proposed voting for the bill, said (*idem*, p. 9865):

"The other provision of the bill, and I refer to title III, with respect to 'trading with the enemy', has practically the identical provisions, as I understand it, that the bill contained which was in force during the last World War.* * *"

When expressed in terms of the greatest common denominator the House of Representatives certainly understood the bill to represent substantially nothing more than a revitalization of the powers granted to the President in World War I.

When the bill came before the Senate a similar thought of reviving the old legislation was the dominant idea. Proceedings before the Senate regarding Title III of the First War Powers Act, 1941, were carried in the Congressional Record under the heading "Re-enactment of . . . Trading With the Enemy Act", and when the bill was reported from the Committee, Senator Barkley referred to it as the bill "which re-enacts and revives the provisions . . . of the Trading With the Enemy Act" (87 Cong. Rec., Pt. 9, pp. 9789 and 9837).

Senator Van Nuys, Chairman of the Judiciary Committee of the Senate, being asked to make a statement concerning the provisions of the bill, responded (*idem*, p. 9838):

"In a nutshell, the bill grants to the President of the United States the same *war* powers that were exercised by President Wilson during the last World War—and exercised by him with a great degree of success. (*Italics supplied.*)

... when it comes to the Trading with the Enemy Act, in the provisions for seizure and freezing of alien property, it goes further, and not only freezes it, but seizes the property; possession of it vests in the United States, and the property is to be liquidated and disposed of under the rules and regulations of the Department. To that extent it exceeds the powers granted President Wilson."

There then ensued considerable discussion as to Titles I and II. As to Title III, containing the amendment to §5(b), the following colloquy occurred (*idem*, p. 9845):

"Mr. Vandenberg: . . . One final question and I am done.

"Has the Senator now stated to the Senate all the powers in this proposed legislation which exceed the powers granted to President Wilson under the Overman Act and the Trading With the Enemy Act?"

"Mr. Van Nuys: I think so. I have not yet taken up Title III. That is the amendment to the Trading with the Enemy Act. As I remember, it is an exact copy of the former statute, except that in some instances it goes a little further. For instance, in the case of the Alien Property Custodian's Office, or such agency as may take the place of the former Alien Property Custodian's Office, the Attorney General informed us that there are at least \$7,000,000,000 of funds that have to be seized or frozen under present conditions. This measure gives authority to that agency, whether it be the Alien Property Custodian or otherwise, not only to freeze these assets, but to seize them and dispose of them and liquidate them—something that has been contested in the powers of the Alien Property Custodian heretofore. So I will say to the Senator from Michigan that the bill is broader along that line. Outside of that, I know of no further extension of power than President Wilson had."

With no further discussion regarding Title III, the bill was passed by the Senate (*idem*, p. 9846). This record explains the opposition of the Senate to the Custodian's recent efforts to have written into the law a provision denying to friendly aliens the right to recover possession of property seized by the Custodian.

If the purpose of Congress was to revive the 1917 statute, it necessarily follows that Congress was intent on exercising its war power to deal with enemy property, and when reference was made to the vesting of property of "any foreign government or national thereof", this must have referred to the property of any enemy or ally of enemy government, unless otherwise indicated. When §5(b) was originally enacted in 1917 (40 Stat. 415), and amended in 1918 (40 Stat. 966), a reference was made to "any foreign country" and in order to show that this phrase was not to be construed as meaning "enemy or ally of enemy foreign country" there was inserted as a qualifying phrase, "whether enemy, ally of enemy or otherwise". Congress thereby demonstrated that in the context of this section the words "foreign country" might ordinarily be understood to mean "enemy or ally of enemy foreign country".

The same understanding appears also from §6 of the 1917 Act, where the word "alien" was used in describing the officer who was to administer the Act. He was called the "Alien Property Custodian" although his functions related only to the property of *enemy* aliens, and he did not have the power to seize the property of all aliens, but only the property of enemy or ally of enemy aliens.

The Judiciary Committee of the House in reporting the amendments to §5(b) made a similar use of the word "alien" in the sense of "enemy alien". The Committee referred to §301 of the bill as adding in substance to the existing freezing controls "the power contained in the Trading With the Enemy Act with respect to *alien* property". Since the only powers in that act which related to vesting alien property concerned enemy property, the

word "alien" was obviously used in the sense of "enemy alien" (H. Rep. 1507, 77th Cong. 1st Sess. p. 3).

Moreover, at the time of the enactment of the First War Powers Act, 1941, there was no particular need for such an extreme measure as would authorize the President to expropriate the property of friendly aliens, because there already existed the "freezing controls" of foreign property provided for by §5(b) as amended May 7th, 1940 (54 Stat. 179) and broad powers of requisition and condemnation to take over the property of both citizens and aliens.

The amendment to Executive Order No. 8389 issued June 14th, 1941 (Executive Order No. 8785, 3 C. F. R., Cum. Supp., p. 948) extended these freezing controls to transactions affecting the property of every country in continental Europe. (*Documents Pertaining to Foreign Funds Control*, Sept. 15, 1946, Press Release No. 1, p. 64.) It was not then, nor has it been at any time since, possible to transfer or otherwise deal with the shares of the Debtor that are the subject of the Vesting Order in the case at bar without first procuring a license from the Treasury Department. The attempt of the Custodian to vest the interests of the Swiss banks in these shares did not in any respect afford the United States a greater measure of security than already existed under the freezing controls.

As to alien property generally, in addition to freezing controls, the use by the government of all United States patents had been provided for in 1918 (35 U. S. C. §68, 40 Stat. 705; *Richmond Co. v. U. S.* (1928) 275 U. S. 331). The condemnation of land for military purposes was also provided for in 1918 (50 U. S. C. §171, 40 Stat. 518) and although this power was amplified by the Second War

Powers Act, 1942 (50 U. S. C. §171a, 56 Stat. 177), the amplification would not have been different if in the amendment of §5(b) by the First War Powers Act, 1941, the words "foreign country" were understood as "enemy or ally of enemy foreign country". The power to requisition military material and supplies intended for shipment abroad was conferred upon the President in October 1940 (54 Stat. 1090). The power to requisition military and naval supplies generally was enacted in April 1941 (50 U. S. C. §721; 55 Stat. 742). The power to take over foreign and domestic ships was granted in June 1941 (50 U. S. C. §§1271-75; 55 Stat. 242). And the power to take over plants for defense purposes was contained in the Selective Service Act of 1941 (50 U. S. C. §309; 54 Stat. 892). All these powers related to both citizens and aliens *and contained express references to compensation for the owners.*

For Congress in December 1941 to have intended to grant the President the power of expropriating property of friendly aliens merely because of the fact that they were aliens was wholly unnecessary so far as the safety of the United States was concerned, was contrary to historic American policy so far as international relations were concerned, and could only be rationalized on some theory of war hysteria which the record shows did not exist, at least in the minds of Congress.

The very fact that the amendment to §5(b) made no reference to compensation should in itself be sufficient to establish that Congress was thinking in terms of enemy property for which no compensation is required.

The purpose on the part of Congress to re-enact or revive the Trading With the Enemy Act of 1917 rather than

to supplant it by an act designed upon a different theory is corroborated by the persistent refusal of Congress to make further amendments proposed by the Alien Property Custodian and obviously intended to manifest a purpose to depart from the original pattern. In the 78th Congress, 2d Session, H. R. 4840 and H. R. 5031 were clearly introduced with the hope of confirming the construction of §5(b) now urged by the Custodian. These bills died in Committee. A renewed effort was made in the 79th Congress, 1st Session, to bring about this change by the introduction in the House of H. R. 1530 and in the Senate of S. 526. They met a similar fate. In the 79th Congress 2nd Session, a third effort was made to accomplish the same result by including an appropriate provision in a bill (H. R. 5089) primarily concerned with releasing enemy property to refugees. The proposed amendment would have expressly denied friendly aliens the right to recover under §9(a) possession of property vested by the Custodian. The Judiciary Committee of the Senate not only struck out this proposed amendment but its report expressly stated that by the omission there was preserved the rights under §9(a) which friendly foreign nationals had for more than 25 years under the Act. (*Senate Rep., 1839, 79th Cong. 2d Sess.*). In the discussion which attended the passing of the bill in the House it was also expressly stated that by eliminating the proposed amendment the rights of friendly aliens remained unchanged (92 *Cong. Rec. Pt. 8, p. 10218*). The history of the last of these efforts is significant.

In December 1945 H. R. 5089 was introduced by Representative Sumners, Chairman of the House Committee on the Judiciary, for consideration by the Second Session of the 79th Congress. Apparently from comments made dur-

ing the hearings, the bill was prepared in the Office of the Alien Property Custodian.

§33 of H. R. 5089 contained *inter alia* the following provisions:

"Sec. 33. (a) A foreign country or national thereof within the meaning of section 5(b) hereof may not institute, prosecute, or further maintain a suit pursuant to section 9(a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof.

"(b) Notwithstanding the provisions of section 7(c) hereof, suit may be instituted by any person not an enemy or ally of enemy against the United States in the Court of Claims for just compensation in respect of any property or interest taken from the plaintiff and vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), but the complaint in such suit shall be dismissed on the merits unless the plaintiff establishes that he is a person entitled to just compensation by virtue of the last clause of the fifth amendment to the Constitution of the United States."

Hearings were held on the bill before a sub-committee of the House Committee on the Judiciary in February and May, 1946. Prior to the hearings and under date of February 4th, 1946, Mr. Byrnes as Secretary of State, addressed a letter to the Chairman of the House Committee on the Judiciary in which he objected to subdivision (b) quoted above on the ground that its effect was to deny to a friendly alien the right to obtain a return of his property and to substitute only such rights for just compensation as are

granted by the Fifth Amendment, as to which he stated that the Department of Justice claims that a friendly alien does not have any rights under the Fifth Amendment to just compensation. Mr. Byrnes declared that the clause carried a grave threat to the rights of American nationals in foreign countries, and if the position of the Department of Justice is correct, would relegate friendly aliens to a position of being without remedy for the seizure of their property except for Mr. Markham's suggestion that these rights be handled by diplomatic representations, to which suggestion the Department of State strongly objected both on principle and on grounds of enlightened self-interest. The full text of Mr. Byrnes' letter is set forth in full in the report of the hearings (*Hearings Before Sub-Committee No. 1 of the Committee on the Judiciary, H. R. 79th Cong. 2d Sess., on H. R. 5089*, pp. 28-29).

As a result of this objection, representatives from the offices of the Alien Property Custodian, the Attorney General and the Secretary of State seemed to have gotten together and prepared an amendment to §33 of the bill designed to overcome the objection of the Secretary of State by omitting the reference to the Fifth Amendment in subdivision (b) and substituting in place thereof a very complicated method for determining who would be entitled to sue in the Court of Claims and the conditions under which such suits should be prosecuted. Subdivision (a) was substantially retained. The bill as so amended is set forth in the report of the hearings, before the sub-committee (*supra*) at pp. 43 *seq.*

On June 26th, 1946 Representative Sumners introduced the bill in its amended form as H. R. 6890. The following day the Committee on the Judiciary favorably reported the

bill as so amended (*House Report 2398, 79th Cong. 2d Sess.*).

In the bill as so reported subdivision (a) of §33 remained substantially the same as above quoted and subdivision (b) was entirely rewritten so as to provide that notwithstanding the provisions of §7(c) a person whose property had been taken by the Alien Property Custodian could proceed in the Court of Claims for just compensation upon complying with numerous conditions in the bill set forth (*House Report, pp. 23 seq.*).

About the same time a bill identical with H. R. 6890 was introduced in the Senate as S. 2378. At the Senate hearings which were held in July 1946 a number of persons appeared in opposition to §33 (*Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 79th Cong., 2d Sess. on S-2378*). It was urged that the bill repealed existing law which permitted friendly aliens to recover their seized property under the provisions of §9(a) (*Senate Hearings, pp. 37, 40, 84*); that the denial to a foreign country or national thereof of the right to proceed under §9(a) was unconstitutional as lacking due process (*Senate Hearings, pp. 40, 58 seq.*); that it would discriminate against friendly aliens (*Senate Hearings, pp. 68, 89*) and violate treaties of friendship (*Senate Hearings, p. 42*); that it would produce a hostile feeling among foreign nations and bring about retaliation (*Senate Hearings, p. 62*); that it would invite a repetition of policies of expropriation such as occurred in Mexico some years ago (*Senate Hearings, p. 64*); and that the enactment of such a section would cause a great deal of harm and detriment from the public relations and advertising point of view in our efforts to promote foreign trade (*Senate Hearings, p. 87*).

For the purpose of meeting these arguments, representatives of the Alien Property Custodian and the Attorney General claimed that the effect of the amendments to §5(b) by the First War Powers Act, 1941, was to modify §9(a) so as to deny to friendly aliens the rights which they previously enjoyed (*Senate Hearings*, pp. 97 and 98) and in support of this contention, the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar (*Silesian-American Corporation v. Markham*) was cited, and a copy of the opinion by Judge Learned Hand was placed in the record (*Senate Hearings*, p. 99). In taking this position neither the representative of the Alien Property Custodian nor the Attorney General attempted to explain, and the Committee did not attempt to ascertain, why the proposed §33 was desirable, if as they alleged, the same effect had already been achieved by the amendments to §5(b) in 1941.

In making its report on S. 2378 (H. R. 6890) the Senate Committee on the Judiciary (*Senate Report No. 1839, 79th Cong. 2d Sess.*) struck out §33 entirely. In doing this, of course, they eliminated the provisions which denied to friendly foreign countries and the nationals thereof the right to recover seized property under §9(a) of the Trading With the Enemy Act, and also the provision that notwithstanding §7(c) of that Act, just compensation could be obtained by a suit in the United States Court of Claims. In explaining this deletion the Committee said (*Report*, p. 2):

“ . . . The purpose of this amendment is to eliminate the proposals to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a). *The bill as thus amended preserves in full these rights under 9(a) which the friendly foreign national, together*

with United States citizens has had for more than 25 years under the act." (Italics supplied.)

The report of its Judiciary Committee was filed in the Senate on July 26th (92 *Cong. Rec.*, Pt. 8, p. 10115), and on the same day Representative Celler submitted to the House a copy of the bill as reported in the Senate and asked for a suspension of the rules so that the revised bill could be voted upon (92 *Cong. Rec.*, Pt. 8, p. 10215).

In the discussion which attended the passage of the bill the elimination of §33 was referred to and Representative Philbin inquired (92 *Cong. Rec.*, Pt. 8, p. 10218):

"If Section 33 is eliminated from this bill, then the law as then written would give to foreign friendly nationals the right to be sued and to sue in our courts and have their rights adjudicated?"

To this inquiry Representative Celler replied:

"I may say to the gentleman that the elimination of Section 33 gives the right to a foreign national to sue for the return of his property, either in law or in equity. That does not apply to an enemy alien, only to a friendly foreign national. *That right remains unchanged if we eliminate Section 33.*" (Italics supplied.)

The rules were thereupon suspended by a two-thirds vote and the bill passed by the House.

The bill so passed by the House was brought up in the Senate on July 29th and passed with four minor amendments not included in the report of its Judiciary Committee (92 *Cong. Rec.* Pt. 8, p. 10371). These amendments made from the floor of the Senate, required that the bill again go before the House, and the additional amendments were

concurred in by the House on July 30th, 1946 (92 *Cong. Rec. Pt. 8*, p. 10486).

It will thus be seen that the opinion of Judge Learned Hand in the case at bar was submitted to the Senate Committee on the Judiciary as authority for the proposition that the effect of the amendments to §5(b) contained in the First War Powers Act, 1941, was to deprive friendly aliens of the right to recover in a proceeding under §9(a) property vested by the Alien Property Custodian and to relegate them to a suit in the United States Court of Claims to recover just compensation. With this opinion before them the Senate Committee on the Judiciary nevertheless expressly stated that by eliminating provisions designed to conform the statute with the construction placed upon §5(b) by Judge Learned Hand, it was the purpose of the Committee to preserve in full those rights under §9(a) which friendly foreign nationals, together with United States citizens, had had for more than 25 years.

In passing the bill both the House of Representatives and the Senate acquiesced in the interpretation of the statute declared by the Judiciary Committee of the Senate. Thus, the construction urged by the Custodian and placed upon §5(b) by Judge Hand was definitely rejected by the authors of the statute as contrary to their understanding of its provisions.

While it is true that the opinion expressed by the Judiciary Committee of the Senate and acquiesced in by both houses of Congress was addressed to §9(a), and the case now at bar has to do with §8(a), the wording of the two sections so far as they affect the rights of friendly aliens are identical, and if in §9(a) the meaning of the words "any person not an enemy or ally of enemy" was not changed

by the amendments to §5(b), it necessarily follows that no change was made in the meaning of the same words in §8(a), and if under §9(a) a friendly alien may still sue to recover possession of vested property, then, under §8(a) a friendly alien may retain possession of property held by such friendly aliens as pledgee.

The evidence is clear that when amending section 5(b) in 1941 the purpose of Congress was to revive and re-enact so far as necessary the Trading With the Enemy Act of 1917, which related to the seizure of enemy property, and that there was no intention of basing the statute on a Congressional power under the Constitution entirely different from that which had been employed in 1917. Furthermore, this conclusion is confirmed if the possible effects of the 1941 amendment be examined in the light of recognized canons for statutory construction.

Intent as Determined by the Rules of Construction

Where two statutes relating to the same subject have been enacted and the later can be reconciled with the former by limiting its general terms, Congress will be deemed to have intended that the general terms shall be so construed.

In *Frost v. Wenie* (1895) 157 U. S. 46, a statute provided that certain lands held in trust for the Osage Indians should be opened only to settlers possessing specified qualifications. Later in the same year another statute was enacted providing that lands in the Fort Dodge military reservation should be opened to settlers generally. The terms of the later statute literally embraced some of the lands covered by the earlier act. This Court held that the earlier act had not been repealed to the extent of the apparent conflict, but that the general terms of the later act were not intended to

include the lands covered by the earlier statute. In the opinion of the Court Mr. Justice Harlan said at page 58:

"It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace *all* the lands within the abandoned Fort Dodge military reservation north of the Atchison railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute."

To the same effect see .

U. S. v. Healey (1895), 160 U. S. 136-146;
U. S. v. Greathouse (1897), 166 U. S. 601-605;
U. S. v. Lee Yen Tai (1902), 185 U. S. 213-221;
U. S. v. Burroughs (1933), 289 U. S. 159-164.

The same rule is applied if, by limiting the generality of the terms employed, the constitutionality of a statute may be preserved.

U. S. v. Walter (1923), 263 U. S. 15-18.

In the instant case, so far as §5(b) relates to the vesting of property, it can be reconciled with §8(a) and §9(a) and

with all the other sections of the Trading With the Enemy Act by construing the words "foreign country or national thereof" as meaning "enemy or ally of enemy foreign country or national thereof". This Court is therefore obliged by its long-standing rules to conclude that such was the intention of Congress.

If section 5(b) is construed in the manner determined by Judge Hand, that is to say by eliminating from §8(a) and §9(a) the phrase "enemy or ally of enemy" and substituting in place thereof the phrase "foreign government or national thereof" the result is to deny to friendly aliens rights enjoyed by citizens of the United States, because the citizen may under §9(a) recover the property that was seized whereas the friendly alien may only recover the value thereof at the time of seizure. Judge Hand made this very clear in his opinion when he said (R. 66-67):

"* * * A friendly alien stands in a position different from either an enemy or a citizen whose property has been seized. A citizen may avail himself of §9(a) to reclaim his property, as much when it has been seized under §5(b) as under §7(c); if he is successful in the suit, he will be restored to possession for the seizure will be shown to have been unlawful. Such too was the position of a friendly alien under §9(a) in the original Act. An enemy or an ally of enemy is positively and intentionally denied relief, not only in §9(a) but elsewhere, because his property may be forfeited; he can rely only upon the grace of Congress. But by hypothesis a friendly alien cannot reclaim his property if the seizure has been lawful; and yet he cannot be deprived of it without just compensation, because the Fifth Amendment protects him." * * *

Such a result is certainly a violation of existing treaties. Article 1 of the *Convention of Friendship, Commerce and Extradition* of 1850 between the United States and Switzerland (2 Malloy *Treaties, Conventions, etc.*, p. 1764) which is still in effect (*Treaties in Force on December 31, 1941*, Publication 2103, U. S. State Department, p. 161) provides that:

"The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitution or legal provisions, as well federal as State and cantonal, of the contracting parties. . . . they shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject."

The last paragraph of Article 2 of the same treaty reads as follows (*id.* p. 1765):

"In case of war, or of expropriation for purposes of public utility, the citizens of one of the two contracting parties, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained."

Article 2 of the *General Multilateral Convention for the Protection of Industrial Property* (dated June 2nd, 1934 but ratified and proclaimed by the United States October 28th, 1938) (53 Stat. 1748, 1772) to which Switzerland was a party, reads as follows:

“(1) Nationals of each of the countries of the Union shall, in all other countries of the Union, as regards the protection of industrial property, enjoy the advantages that their respective laws now grant, or may hereafter grant, to their own nationals, without any prejudice to the rights specially provided for by the present convention. Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the conditions and formalities imposed upon nationals.”

It is a long standing rule that before the courts will impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the statute, which is supposed to constitute the violation, must admit of no other reasonable construction * * *.”

In re Chin A. On, (1883) 18 F. 506;

Chew Heong v. U. S., (1884) 112 U. S. 539-549;

Frost v. Wenne, (1895) 157 U. S. 46-59;

Cheung Sum Shee v. Nagle, (1925) 268 U. S. 336-345;

Pigeon River Imp. Co. v. Cox, (1934) 291 U. S. 138-160;

U. S. v. Payne, (1924) 264 U. S. 446-449.

To conclude that Congress intended to withdraw from friendly aliens property rights which American citizens

continued to enjoy would not only violate existing treaties, but would conflict with established American foreign policy, and serve as a dangerous precedent to other nations. It was this latter phase of the subject which caused Secretary of State Byrnes to express alarm to the House Committee on the Judiciary in his letter of February 4th, 1946, when that Committee had under consideration the bill designed to write into the statute an express provision denying to friendly aliens the right to recover their property under §9(a) of the 1917 statute. (*Hearings Before Sub-Committee No. 1, Committee on the Judiciary, House of Representatives, 79th Cong. 2d Sess. on H. R. 5089, p. 28.*)

Another long-standing principal of statutory construction is the proposition that Congress will not be deemed to have intended to enact an unconstitutional statute.

Plymouth Coal Co. v. Pennsylvania, (1914) 232 U. S. 531-546;

Presser v. Illinois, (1886) 116 U. S. 252-269;

Grenada County v. Brogden, (1884) 112 U. S. 261-269.

Congress had been warned that the Trading With the Enemy Act without §9(a) would be of doubtful constitutionality so far as it related to other than enemy property. In *Becker Co. v. Cummings* (1935) 296 U. S. 74 Mr. Justice Stone said at page 79:

“The seizure and detention which the statute commands and the denial of any remedy except that afforded by §9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it.”

and at page 81:

" * * * Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court to give to citizens and *alien friends* an adequate remedy for invasions of their property rights in the exercise of the war powers of the Government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies." (Italics supplied)

In *Garvan v. \$20,000 Bond* (C. C. A. 2d 1920) 265 F. 477, affd. 254 U. S. 554, the Circuit Court of Appeals said at page 479:

" * * * If persons not alien enemies or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9."

The Constitutional infirmity referred to in these passages related to the problem of providing just compensation under the Fifth Amendment. In the last paragraph of §7(c), it is stated that the sole relief and remedy of any person having any claims to any money or other property heretofore or hereafter seized by the Custodian shall be that provided by the terms of the Trading With the Enemy Act. Mr. Justice Roberts in his dissenting opinion in *Becker Co. v. Cummings* (*supra*), said at page 84 that this provision,

" * * * precludes a suit for the property or the proceeds of it under the Tucker Act."

This clause in §7(c) raised a barrier to both citizens and friendly aliens alike. The Tucker Act referred to by Mr. Justice Roberts is the Statute that confers jurisdiction on the Court of Claims (28 U. S. C. §250) as to "All claims founded upon the Constitution of the United States or any law of Congress . . . upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a Court of law, equity or admiralty if the United States were suable. . . ." However, "The jurisdiction of the said Court shall not extend to any claim against the government . . . growing out of or dependent on any treaty stipulation entered into with foreign nations . . ." (28 U. S. C. §259). And aliens who might otherwise sue in the Court of Claims, may only do so if they are "citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government . . ." (28 U. S. C. §261). In view of the fact that the claim of a Swiss national is in some measure at least dependent upon the treaty of 1850 (*supra*) there is serious doubt whether Swiss nationals even in the absence of the interdiction contained in §7(c) could sue to recover compensation for property seized by the Custodian under §5(b).

Moreover, if the alien's government does not provide reciprocal relief, he is definitely precluded from recovering just compensation in the Court of Claims.

With these considerations before it one can scarcely imagine that Congress would have failed to specify a means of redress if it intended that §5(b) should operate to obliterate the words "enemy or ally of enemy" from §§8(a) and

9(a) of the old Act and substitute in place thereof the words "foreign government or national thereof", especially in view of the fact pointed out by Secretary of State Byrnes in his letter to the Judiciary Committee of the House, that the Department of Justice claims a foreign national does not have any constitutional rights to just compensation, and the further fact that such an intention was contrary to traditional American policy (*Hearings Before Subcommittee I, Committee of the Judiciary House of Rep., 79th Cong., 2nd Sess., on H. R. 5089, p. 29*). As Secretary of State Byrnes said in his letter (p. 29):

"The position of the Government of the United States has consistently been that American property and other interests abroad are entitled to fair and equal treatment as compared with locally owned property. . . . Moreover, the United States has always insisted upon the principle of adequate compensation if American property interests abroad were affected. . . ."

"The embarrassment to this United States policy stated which is inherent in the underlined language is apparent. Should nationalization of a given type of property be accomplished in a foreign country, the Department would not—if section 33(b) as now drafted becomes law—be able to insist that the legislation implementing such nationalization provide either equal treatment for American interests or adequate compensation for interests which were taken. *The importance of this question cannot, especially at present, be minimized.* (Italics supplied)

"Traditionally, the United States has encouraged foreign investment in the United States, and has regarded favorably American investment in friendly foreign countries, subject only to overriding considerations of national security. . . . The Depart-

ment of State is even now attempting to secure complete equality of treatment for American property interests in areas in which the war was fought with respect to local legislation on war damage compensation. Under these circumstances, a deliberate legislative enactment by the United States which discriminates against friendly foreign nationals and denies to them even just compensation for seizure of their property by an agency of the United States (unless compelled by the Constitution) seems a short sighted departure from principles which this Government has long advocated. The damage to American interests which might result cannot be adequately estimated.

"The position of the United States in insisting upon equal treatment and just and adequate compensation for interests of American nationals abroad has been based upon the assertion, well-founded until now, that the United States accorded such treatment to the property and interests here of friendly foreign nationals. Should this position be destroyed, by enactment of the cited provision, the ability of the United States to prevent like discrimination against American foreign interests will be seriously jeopardized if not destroyed."

These remarks of Secretary Byrnes were addressed to a proposed statutory construction of §5(b) along the lines now urged by the Custodian. The same considerations would necessarily apply to a judicial construction, and with the background which Secretary Byrnes recites, it is difficult to conceive of this Court concluding that Congress originally intended its amendment of §5(b) so to be understood.

If §5(b) is construed as having been intended by Congress to override all the rights previously secured to

friendly aliens by the Trading With the Enemy Act, there are yet other constitutional objections that arise. They relate to due process and the unlawful delegation of legislative power.

§7(c) of the 1917 statute provided that " * * * any money or other property * * * owing or belonging to * * * an enemy or ally of enemy not holding a license * * * which the President after investigation shall determine is so owing or so belongs * * *, shall be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * * " (50 U. S. C. A. p. 210).

The provision required first, an investigation, second, a finding of fact, and third, a determination that no license had been issued. It was obviously designed to prevent capricious and arbitrary action on the part of the Executive in seizing property believed to pertain to the enemy.

In *Hunter v. Central Union Trust Co.* (D. C., S. D. N. Y., 1926) 17 F. 2d, 174, it was held that a failure to comply with the requirement of the statute rendered an attempted seizure by the Custodian invalid. The Government seems to have acquiesced in this decision by failing to take an appeal.

§5(b) as amended contains no provision for an investigation and determination of actual or supposed enemy connection as required by §7(c) unless the two sections be construed as complementary to each other. The petitioners claim that in the case of property of friendly aliens it is not reasonable to suppose that Congress intended to withhold from the statute a necessary and salutary safeguard against capricious and arbitrary actions which the Constitution forbids. In *B. & O. R. Co. v. U. S.* (1936) 298 U. S. 349, Mr.

Justice Butler, in quoting from the opinion in *Reagan v. Farmers Loan & Trust Co.* 154 U. S. 362, said at page 366:

"This, as has often been observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

Another evidence that Congress did not intend §5(b) as an over-riding statute is the indefinite nature of its provisions when so construed—so indefinite as to render the statute unconstitutional. Congress was cognizant of the requirements of this Court as stated by Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388 in which he said at page 415:

"* * * Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

and at page 430:

"* * * As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

The same principles were enunciated and applied in *Schechter Corp. v. U. S.* (1935) 295 U. S. 495.

In the case at bar we are concerned with the portions of §5(b) relating to the vesting of property of friendly aliens. Unless the words "foreign country or national thereof" are construed to mean "enemy or ally of enemy foreign country or national thereof", there is no suggestion as to what policy the President should pursue in causing any such vesting to take place or what distinction is to be made between enemy property which Congress has the power to confiscate and non-enemy property which cannot be taken without just compensation. Nor are there any standards set up for the purpose of ascertaining in what manner, at what time, and upon what terms any vesting may occur, or what factual finding is to be made by the President as the basis for causing the title to pass in the process of "vesting". There is no requirement that the property shall be found to be infected with an enemy interest or that the owner has been guilty of acts inimical to the United States or that the property may be put to hostile use, or that its taking shall in any way benefit the Government in the prosecution of the war.

As to dealing with property after vesting has occurred, §5(b) is limited only by the provision that it shall be held for the "interest and benefit of the United States". No policy is suggested as to whether the property is to be retained or liquidated, or converted into cash or utilized for war purposes or whether the sale or other disposition is to be safeguarded in any manner; no standards are set, and no factual findings are required.

The same vice exists in regard to the President's power to require the keeping of records, the furnishing of informa-

tion, the seizure of books and papers, and the "taking of other measures not inconsistent herewith for the enforcement of this subdivision".

And according to the statute none of the foregoing is to be a limitation on the power of the President to prescribe definitions for any or all of the terms used in this subdivision. By defining the word "national" of a foreign country it is possible for the President to make it include persons and apply to circumstances not comprehended by the words "enemy or ally of enemy" in the usual definitions of legislators and lexicographers or of §2 of the 1917 Act and in making such definition there is no indication as to the policy by which the President should be governed, no standard with which he should conform and no findings of fact necessary as conditions precedent to the exercise of his extraordinary power.

If anyone fails to comply with the exercise of any of these powers uncontrolled by any statement of policy, unlimited by any standards, and needing no factual determinations, the person's failure is made a crime in the category of a felony with very serious penalty.

As to that part of §5(b) which has to do with the vesting of property owned by aliens, there has been no subsequent Congressional ratification, such as occurred in relation to freezing controls (cf. *U. S. v. Von Clemm* (C. C. A. 2d 1943) 136 F. 2d 968), although bills have been introduced in Congress designed to effect such a result (H. R. 4840 as amended after hearings in H. R. 5031 78 Cong. 2d Sess; H. R. 1530, S. 526, 79th Cong. 1st Sess.). But these bills never got out of the Judiciary Committee.

In the Court below Judge Hand recognized the indefinite nature of §5(b) when construed in the manner which

he adopted and attempted to justify it by becoming more indefinite than the statute itself. He said (R. 65):

“ . . . it is true that the section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through ‘rules and regulations’. The only objection to this which can be raised is that it disturbs the constitutional ‘separation of powers’; for, since it is to be exercised by regulations, it cannot as such be said to subject individuals to unascertainable duties or penalties; that will depend upon the regulations themselves. The occasions upon which such a power should be exercised are incapable of catalogue or definition; or, indeed, of statement in any other terms than that the interest of the country demands the prescribed action.”

In this statement Judge Hand was in error. §5(b) does not require the President to act by any rules or regulations. The issuance of rules and regulations is not a condition precedent to any action by the President; the statute merely states, “under such rules and regulations as he *may* prescribe”. Even so, this is nothing more or less than delegating to the President a power to determine basic policy which may be exercised solely by Congress itself.

Judge Hand also errs in concluding that the statute provides for exercise of the power in such manner as the interest of the country demands. There is no such limitation in the statute. The nearest approach to such a limitation is a provision that after property has been vested, it shall be held and dealt with “in the interest of and for the benefit of the United States”.

The basic question involved is whether Congress may,

if so disposed, make such a broad and unrestricted delegation of its legislative power as is represented by §5(b) when construed in the manner adopted by Judge Hand, who seems to confuse the principle of delegation with the constitutional axiom regarding the separation of powers. They are not the same and no good can come from attempting to justify one in the terms of the other.

If the theory for the delegation of legislative power pronounced by Judge Hand is approved by this Court, it will mean that Congress is no longer limited in the degree to which it may abdicate its functions to the Executive. Such a result is so contrary to the previous decisions of this Court and to the temper of Congress that it becomes the strongest argument against the construction which Judge Hand undertakes to place on the statute.

In view of these considerations the conclusion seems inescapable that in amending §5(b) by the First War Powers Act, 1941, Congress clearly intended that §5(b) should not be construed in derogation of the other permanent provisions of the Trading With the Enemy Act.

POINT III

If the amendment of §5(b) by the First War Powers Act, 1941, has not repealed or modified §9(a), it necessarily follows that §8(a) has not been repealed or modified.

In *Uebersee Finanz-Korporation v. Markham* (1946), 158 F. 2d 313, the Court of Appeals for the District of Columbia has held that the amendment to §5(b) by the First War Powers Act, 1941, does not operate to nullify

the provisions of §9(a) and that the relative provisions are not inconsistent. Mr. Chief Justice Groner states in his opinion (p. 315):

"The Custodian attempts to avoid the stark obliteration from §9(a) of the words 'Any person not an enemy or ally of enemy', by saying that that section limits recovery to 'the interest therein' of the claimant, and accordingly the Custodian insists there may be no recovery here because seizure under amended §5(b) destroys all interests of all aliens in seized property. But there is nothing in §5(b) to sustain this view and to adopt it would read into that section words that are not there and at the same time, and with just as little warrant, read out the quoted words from §9(a). This assumes, we think, too much."

§§8(a) and 9(a) are different sides of the same coin. §8(a) exempted from seizure enemy property held by non-enemy pledgees with power of sale by providing that the pledgees could retain possession of such property and exercise their usual rights in relation thereto. As was shown under Point I (*supra*, p. 10), §8(a) was deliberately designed as an exception to the power of seizure accorded to the Custodian. §9(a) on the other hand, provides that a non-enemy owner of property may recover possession of the property mistakenly seized. §8(a) relates to the retention of possession and §9(a) has to do with the recovery of possession. The wording of the two sections so far as it relates to non-enemies is parallel. §8(a) provides that (*infra* p. 72), "any person not an enemy or ally of enemy" who is a pledgee of enemy property with power of sale "may continue to hold said property". §9(a) provides that (*infra* p. 74), "any person not an enemy or ally of enemy"

claiming an interest in property that has been seized may institute a suit to establish his right, "title or interest in said property, "and if so established the court shall order the . . . delivery to said claimant of the . . . property 'so held . . . to which the court shall determine said claimant is entitled." If §9(a) still stands, §8(a) must also be persistent.

As pointed out by Mr. Chief Justice Groner, to adopt the view of the Custodian would be to eliminate from §9(a) the words "any person not an enemy or ally of enemy" and to substitute in place thereof "any person not a foreign country or national thereof". The Custodian's position regarding §8(a) would produce a similar result in that section. There is no justification for either of these proposals.

Regarding §9(a), the Custodian has recognized the weakness of stating his argument in terms of its effect on the statute, and endeavors to avoid this embarrassment by round about reasoning. As suggested by Mr. Chief Justice Groner in the above quotation and also by Judge Hand (R. 67), the Custodian concedes that any person not an enemy or ally of enemy may sue to recover property which such person claims, but the Custodian nevertheless urges that the suit would be futile, because through the operation of §5(b) the claimant has lost his interest in the property and ceased to be "entitled" to any part thereof. While this artificial argument may be made with respect to §9(a), it is entirely inapplicable to §8(a), because the former has to do with the recovery of possession, whereas the latter provides for the retention of possession. If, after the amendment to §5(b) a non-enemy under §9(a) still had the power to sue for possession, though ineffectually, it would logically follow that under §8(a) a non-enemy still had the power to re-

tain possession, and the spurious nature of the Custodian's argument is thus exposed.

Consequently, if the decision of the Court of Appeals in the *Uebersee* case is affirmed, as a corollary thereto the decision of the Circuit Court and of the District Court in the case at bar must be reversed.

POINT IV

The exculpatory provisions of §5(b)(2) and §7(e) do not protect the debtor and relieve it from doubt as to possible liability.

In the instant case §8(a) provides that a friendly alien who holds property as a pledgee with power of sale may retain possession of such property, and the Custodian does not have the right to take it into his possession. The history of §8(a) in Congress definitely shows that it was to be a limitation on the power of seizure conferred upon the Custodian by §7(c). If this be true, any demand to seize or order to vest issued by the Custodian is invalid. The Custodian however, claims that the Debtor has no right to be concerned with the validity of any such demand or order, and should be compelled to comply with it because §5(b)(2) and §7(e) exculpate the Debtor from liability. It would seem that the mere statement of this contention should demonstrate its vicious nature. Because, if a public official can thus coerce an interested party into compliance with his unlawful actions, thereby also impairing the rights of others, a long stride has been taken toward making this a government of men and not of laws.

Judge Hand in his opinion evinced an inclination to concede that such an exculpatory clause would be invalid with respect to an unconstitutional statute. He states (R. 67):

"* * * Thus, it can be argued with much force that, unless some provision can be found by which he (a friendly alien) may secure compensation, §5(b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection 2 would be valid * * *".

Hence, the Circuit Court indicated that an act by a public servant unlawful because the controlling statute was unconstitutional, would not be protected, whereas an act by the same public servant in violation of a constitutional statute would nevertheless acquire the aspect of legality by being enforceable despite its infirmity.

Both §5(b)(2) and §7(e) provide exculpation for acts done "pursuant to * * * any rule, regulation, instruction or direction issued hereunder * * *", or "in pursuance of any order, rule or regulation made by the President under the authority of this act." If the Custodian's order is a violation of the statute, it cannot be said to have been issued in pursuance of the statute. This consideration in itself should be sufficient to justify the conclusion that compliance with the Custodian's order cannot protect the Debtor and relieve it from doubt, at least until the order is definitely determined to be lawful.

In addition to this consideration, however, it is believed that the very nature of these exculpatory statutes is such as to render them unconstitutional.

The exculpatory clauses of both §5(b)(2) and §7(e) are substantially the same and have two different aspects. One purports to concern obligations of persons affected by

acts done in pursuance of the statute, and the other purports to impose restrictions on what a court may do in relation to conduct connected with the administration of the statute.

As to the subject of obligations, §5(b)(2) provides that "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. * * *". §7(e) in treating the same subject, provides, "Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." The central idea in each clause is represented by the word "obligation". This word is not qualified. Ordinarily the word "obligation" when used in connection with payment, etc. means the obligation of the person making the payment to the person receiving the same; that is to say, in the instant case the obligation that would be discharged would be the obligation of Silesian-American Corporation to the United States or to the Alien Property Custodian. Such however does not appear to be the construction placed upon the word by the District Court, which apparently understood the word "obligation" as meaning the obligation of Silesian-American Corporation to all persons whomsoever, including Non-Ferrum and also the Swiss banks (R. 49). The Circuit Court disposed of this difficulty by saying (R. 66):

"(We pass without discussion the patently untenable argument that this covers only 'obligations' and liabilities to the United States.)"

The petitioners claim that if the word "obligation" is construed to mean obligations to all persons whomsoever, to that extent the statute is unconstitutional.

Turning now to the second aspect of the exculpatory clause, we find that §5(b)(2) provides,

"... no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

§7(e) provides, "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

The second aspect of the clause goes much farther than the first aspect mentioned above. It attempts in effect to close every court in the land to claims that might otherwise be asserted on account of unlawful conduct either by government agencies or by others acting in response to the demand of such agencies. It says in substance that if any suit is based upon conduct connected with the statute, regardless of what the actual facts may have been, the simple fact that the defendant acted in good faith in pursuance of the statute shall preclude consideration by the court of all other facts, whether they involve constitutionality of the statute, the stupidity or mistake of government employees, a deliberate violation of the statute by such

employees, or a special obligation of the defendant in the absence of the statute. This second aspect therefore goes beyond a conclusive presumption. It represents a direct and unqualified attempt to interfere with the normal function of a court.

Although this Court in *Great Northern Ry. Co. v. Sutherland* (1927), 273 U. S. 182-194, evidently without hearing argument on the subject, but after having established the validity of the demand by the Custodian, said that §7(e) afforded the railway company protection, the petitioners contend that, especially in the light of subsequent decisions, these clauses whether contained in §5(b)(2) or §7(e) are invalid so far as the instant case is concerned because (1) they attempt to set up in effect a conclusive presumption as to controversies arising between Silesian-American Corporation and the Swiss banks; (2) they represent an attempted invasion by Congress of the judicial process; and (3) if §5(b) as amended is unconstitutional as to friendly aliens, the exculpatory clause in neither §5(b)(2) nor §7(e) can serve to circumvent the result of such unconstitutionality. For purposes of clarity each of these arguments will be treated under separate headings.

Congress May Not Enact Conclusive Presumptions

This Court has frequently held that a statute which attempts to set up a conclusive presumption is unconstitutional, and that legislative fiat may not take the place of facts in a judicial determination of issues involving life, liberty or property.

Western & Atlantic R. Co. v. Henderson (1929);
279 U. S. 639-642;

St. Louis & O'Fallon R. Co. v. U. S. (1929),
279 U. S. 461-492;

Schlesinger v. Wisconsin (1926), 270 U. S. 230;
Heiner v. Donnan (1932), 285 U. S. 312-325-328;

See also the dicta in

Bandini Petroleum-Co. v. Superior Court (1931),
 284 U. S. 8-19;

U. S. v. Carolene Products Co. (1938), 304 U. S.
 144-152;

Tot v. U. S. (1943), 319 U. S. 463-467.

The Invasion of the Judicial Process

The functions of our government are apportioned, and to the Judiciary has been assigned the duty of interpreting and applying the law. The general rule is that none of the three departments may invade the province of the other or control, direct or restrain the actions of the other. *Massachusetts v. Mellon* (1923), 262 U. S. 447-488.

Congress can exercise no function which is judicial unless it be by the Constitution conferred upon it. *Kilbourn v. Thompson* (1880), 103 U. S. 168.

Congress may not determine the amount of an award for property taken for a public purpose. *B. & O. R. Co. v. U. S.* (1936), 298 U. S. 349.

As to claims to "abandoned" property during the Civil War, Congress could not provide that the acceptance of a pardon deprived the Court of jurisdiction. *U. S. v. Klein* (1871), 80 U. S. 128-145-147.

The Legislature may not forbid the courts to direct a verdict. *Thoe v. Chicago M. & St. P. Ry. Co.* (1923), 181 Wis. 456, 195 N. W. 407.

The Legislature in appropriating funds for paying the salary of an Executive office which it has created, may not determine who such officer may be by providing that the

payment shall be made only to a specific individual. *State ex rel. Worrell v. Carr* (1891), 129 Ind. 44, 28 N. E. 88.

The large number of cases that arose under the Trading With the Enemy Act of 1917 following World War I is mute testimony of the fact that the legal profession in the United States did not regard the exculpatory clause in the statute as providing a certain shield against liabilities for dealings had with the Alien Property Custodian.

***As an Attempt to Avoid by Indirection
the Result of Unconstitutionality***

If the vesting clause in §5(b)(2) is unconstitutional and the exculpatory clause is nevertheless given effect, Congress will thus be enabled in a measure to achieve by indirection that which could not be accomplished by direct enactment.

In *St. Joseph Stock Yards Co. v. U. S.* (1936), 298 U. S. 38, Mr. Justice Hughes in delivering the opinion of the Court said at page 52:

“* * * Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.”

In *Peo. ex rel. Burby v. Howland* (1898), 155 N. Y. 270, it was said at page 280:

“When the main purpose of the statute, or a part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise, the Constitution would furnish frail protection to the

citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands."

To the same effect see

Heiner v. Donnan (1932), 285 U. S. 312-329;
Bailey v. Alabama (1911), 219 U. S. 219-239;
Fairbanks v. U. S. (1901), 181 U. S. 283-294.

POINT V

The District Court erred in failing to give the Swiss banks an opportunity to prove their rights as pledgees with power of sale.

The Debtor corporation is in the custody of the District Court. Its officers, directors, agents, etc., are enjoined from interfering with the possession or management of the property of the Corporation (R. 38). Certificates representing its shares are the property of the corporation and when issued create an obligation or right against the corporation (11 Fletcher Cyc. Corps. §5174). It is therefore not competent for the officers of the corporation to issue new certificates without an order of the Court. In making such an order it is necessary for the Court to determine whether in violation of the corporate by-laws (R. 30-31) and the Uniform Stock Transfer Act (§13; N.Y. Pers. Prop. L., §174) the officers of the corporation should be directed to issue to the Alien Property Custodian new certificates representing shares which the trustee as agent of the Court has reported are held by the Swiss banks as pledgees (R. 41).

In a proceeding under the Chandler Act it is basically necessary for the Court to determine who are the stockholders of the corporation. §196 (52 Stat. 893; 11 U. S. C. §596) provides that:

"After the approval of the petition the judge shall prescribe the manner in which . . . the interests of the stockholders may be . . . allowed."

It was therefore reversible error for the District Court to conclude that the interest of the Swiss banks "cannot be considered here" (R. 49). The Court was under the duty of determining whether Vesting Order 370 was valid or invalid. If 370 was invalid, obviously new certificates should not be issued to the Custodian.

At the hearing before the District Court the Swiss appeared by their attorney and pleaded for time in which to obtain documentary evidence showing their interest in the described shares (R. 17 *seq.*), and after the hearing but before the decision of the Court, documents supplied by the Swiss banks and intended to show their interest were submitted to the Court with the suggestion that they were not the documents which the attorney for the Swiss banks wished to procure (R. 43).

The Court will take judicial notice of the fact that the Swiss banks were in a difficult position in the matter of producing evidence for the purpose of proving their title.

The original order appointing trustees did not provide for the transfer of stock and the issuance of new certificates by the Debtor corporation, and no prejudice could have resulted to the Alien Property Custodian by a refusal to modify this order or to issue new certificates.

It is a well established doctrine that matters pending before a court will be continued where the parties are prevented by war from securing and presenting their proof in an orderly manner.

Watts v. Union Austriaca etc. (1918), 249 U. S. 9-22;

The Kaiser Wilhelm II (C. C. A. 3rd 1917) 246 F. 786-789;

Spreckles Co. v. The Takaoka Maru (S. D. N. Y. 1942), 44 F. Supp. 939.

POINT VI

The order of the District Court should be reversed and the District Court should be directed that new certificates for the shares described in vesting order 370 may not be issued to the Alien Property Custodian, or in the alternative the case should be remanded to the District Court to take further proof to determine whether the Swiss banks are friendly aliens and the said shares are held by the Swiss banks as pledgees within the exemption provisions of §8(a).

Respectfully submitted,

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*Silesian-American Corporation, Debtor
and Silesian Holding Company.*

LEONARD P. MOORE,

WILLIAM GILLIGAN,

of Counsel

APPENDIX

THE TRADING WITH THE ENEMY ACT

SECTION 5(b)

as amended by

§301, Title III, First War Powers Act, 1941

C. 593, 55 STAT. 839

(Portion remaining from previous amendment (54 Stat. 179) shown in regular type; deleted matter shown in bracketed black face type, and new matter shown in italics.)

5(b) (1) During the time of war or during any other period of national emergency declared ~~by the President~~, the President may, through any agency that he may designate; or otherwise, *and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—*

(A) investigate, regulate, or prohibit, [under such rules and regulations as he may prescribe, by means of licenses or otherwise] any transactions in foreign exchange, transfers of credit [between or payments by or to banking institutions as defined by the President,] *or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, [or] currency or securities, and [any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness, or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest,*

by any person within the United States or any place subject to the jurisdiction thereof;]

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President [may] shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any [such] foreign [state] country or any national [or political subdivision] thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be re-

quired, the President may, in the manner hereinabove provided, require [including] the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, [in connection therewith] in the custody or control of such person, [either before or after such transaction is completed.]; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: PROVIDED, HOWEVER,

That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or; if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Section 7(c) as amended November 4, 1918 (40 Stat. 1020):

7(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

Section 7(e) as enacted October 6, 1917 (40 Stat. 418):

7(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any

order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. . . .

Section 8(a) as enacted October 6, 1917 (40 Stat. 418):

8(a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: PROVIDED, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said

instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: **PROVIDED FURTHER**, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

Section 9(a) as amended June 5, 1920 (41 Stat. 977):

9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall de-

termine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 346

SILESIA AMERICAN CORPORATION, Debtor and
SILESIA HOLDING COMPANY,

Petitioners,

against

TOM C. CLARK, Attorney General, as successor to
The Alien Property Custodian,

Respondent.

BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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LEONARD P. MOORE,
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REPLY BRIEF OF PETITIONERS

The Government's Point I

Under Point I the Government argues, citing many cases, the summary nature of the Custodian's power of seizure of enemy property. Not a single one of these cases involves an attempt by the Custodian to seize property in the hands of non-enemy pledgees. Petitioner Silesia does not dispute the proposition that the Custodian had an incontestable power summarily to obtain possession of property determined to belong to an enemy.

Such power, however, does not extend to pledged property. The history of §8(a) clearly demonstrates that it was the express intention of Congress not to permit the Custodian to take into his possession by summary process enemy property in the hands of such friendly pledgees. The Circuit Court of Appeals for the Second Circuit indicated the reason for this exception (*Silesian* brief, p. 15), and Judge Hand conceded that such is the law, unless the amendments to §5(b) produced a different result (R. 67). Consequently the cases cited by the Custodian which do not present a situation in which the Custodian seized or attempted to seize property held by friendly pledgees are beside the point. Moreover, the mere fact that a pledgee whose property had been actually seized by the Custodian could endeavor to obtain compensation under the Tucker Act or to recover possession of the same through a proceeding under §9(a) does not eliminate the specific exemption from seizure provided for in §8(a) nor does it take away the right to resist any attempt by the Custodian to disregard the provisions of §8(a).

The Government's Point II-A

Under Point II-A Government counsel argues that in any event §8(a) confers upon a pledgee nothing more than a personal privilege to continue to hold the pledged property. Within the limitations of the contract of pledge the pledgee is entitled to possession as against all of the world, and therefore he has what has traditionally been known as a right *in rem*. Where the pledged property consists of shares of stock, and the corporation issuing the shares has notice of the existence of the pledge, the corporation is bound to respect and protect those rights until some supervening lawful power has displaced them.

If the Custodian by issuing a vesting order could not obtain possession of the property by overriding the possessory rights of the pledgee, neither should the Custodian be able to obtain possession indirectly by requiring the issuing corporation to deliver a second set of certificates for the same shares without the express consent of the pledgee. In the case at bar the pledgee has not only withheld such consent, but has warned the issuing corporation that if possession is delivered to the Custodian by the issuance of new certificates, the corporation will act at its peril.

In the instant case the Debtor, as issuing corporation, is not only bound to respect the possessory rights of the pledgee, but it is also bound by its by-laws and by statute to resist the issuance of new certificates to any person who does not surrender the old certificates.

If the Government's contention was correct, the Custodian could readily circumvent the immunity granted by §8(a) through the simple device of making a demand on the issuing corporation and completely disregarding the pledgee.

Even if the right to retain possession of the pledged property is what the Government describes as a "personal privilege", the corporation which issued the certificates must nevertheless respect that "privilege" especially when the pledgee has put the Debtor on notice.

The Government is apparently attempting to spell out of the factual situation some theory of abandonment by the Swiss banks of their possessory rights. However, the Debtor was in the custody of the District Court, and the District Court instead of merely advising the Debtor was acting in its place. The Court had been informed by its trustees that the shares were held by the Swiss banks as

pledgees. This was the factual situation which should have controlled the District Court's decision in deciding whether §8(a) gave exemption from seizure.

While hostilities had ceased in Europe by June 1945, normal channels of communication had not been reestablished, such communication as was possible was conducted under great difficulties and a reasonable time had not elapsed within which the Swiss banks could have been expected to transmit to New York the evidence of their pledges in the form required by American practice.

Under the circumstances, the District Court being the instrumentality through which the Debtor was acting, should have directed the Swiss banks to submit the evidence of their pledges and should have accorded them a reasonable time under the circumstances in which to do so. The failure of the Court to do this is explained by the theory on which it disposed of the case. It held in effect that the Swiss banks had no rights under §8(a). The Court said, "Whatever may be the interests or rights of the Swiss banks, they cannot be considered here" (R. 49). The Court might as well have said that the president of the debtor corporation, having been given notice that some of its shares were held by pledgees was under no duty to ascertain the nature of the pledge when a stranger challenged the rights of the pledgee and was seeking to have the corporation issue new certificates in derogation thereof. The District Court was actually performing the dual function of acting as the instrumentality of the corporation and also of presiding over a judicial tribunal. But its ministerial function was completely ignored.

It follows that whether the rights under §8(a) are personal to the pledgees or otherwise, the District Court should not have avoided the duty of determining what

these rights were, if, as the Debtor claims, §8(a) had not been repealed as to friendly aliens by the amendment to §5(b).

The Government's Point II-B

In arguing that the record is barren of evidence to show that the Swiss banks as pledgees conform with the requirements of §8(a) Government counsel demonstrates a failure to comprehend the function of the District Court as a bankruptcy court in administering the affairs of a corporation in reorganization under the Chandler Act.

It is incorrect for Government counsel to state that there is no evidence of the existence of any pledge. The report of the trustee appointed by the Court shows that a pledge existed as late as December, 1941 (R. 42) and a condition once shown to exist will be deemed to continue until the contrary appears (31 C. J. S., §124, p. 736).

The failure of the District Court to perform the ministerial duties which were incumbent upon it as Custodian of the corporation may well be regarded by a foreign court as a ministerial failure which subjects the Debtor to the same liability as would result if a corporate officer had conducted himself in a similar manner when the corporation was not in the custody of the Court.

The Debtor was in no position to request an opportunity to prove the existence of the pledge as suggested by the Government. It was the Court's duty as Custodian to require the presentation of such proof and this duty the Court failed to perform.

The Government's Point II-C

The assertion of Government counsel that the only interest which the Debtor has in prosecuting this appeal

is the danger of double liability, ignores the fact that the Debtor was lawfully directed to do something (i.e., issue in effect a special certificate) which is in violation of its by-laws and of the statutes by which it is controlled. This fact in itself is sufficient to support the Debtor's position. In *Matter of Barnett* (C.C.A. 2nd 1942), 124 F. 2d 1005, a person before becoming bankrupt had assigned an estate in expectancy. Following bankruptcy the trustee obtained an order directing the bankrupt to execute a second instrument of assignment transferring the estate to the trustee. The bankrupt appealed from this order but the assignee failed to do so, and it was urged that the failure precluded the Court from entering an order which would determine the rights of the parties. The Circuit Court of Appeals held that the order of the District Court directing the bankrupt to execute a second instrument was sufficient to justify a reversal. A somewhat similar situation arose in *Fishgold v. Sullivan Dry Dock Corporation* (1946), 328 U. S. 275, and this Court arrived at a like result.

Aside however from the inherent interest that a corporation has in an order directing it to violate its by-laws and controlling statutes, there is danger of double liability. This danger is present in more than an ordinary way by reason of the fact that the Debtor is a corporation with international holdings and its assets in other countries might very well be made the subject of retaliatory action by foreign courts which challenge the proprietary of action taken by American courts.

After all, it must be remembered that because of the theory on which the District Court proceeded the Swiss banks were not given a fair opportunity to prove their pledges and the decisions set forth at page 66 of the

Silesian main brief indicates that this opportunity should have been afforded them. The banks were in effect, non-suited and a non-suit does not bring into play the rule of *res judicata*.

Swift v. McPherson (1914), 232 U. S. 51;

Gardner v. Michigan Cent. R. (1893), 150 U. S. 349;

U. S. v. Parker (1887), 120 U. S. 89-95;

2 Freeman on Judgments, 5th ed., §755, page 1590.

As to the exculpatory clauses of §5(b)(2) and §7(e), the invalidity of these clauses has been dealt with under Point IV of the Silesian main brief. All of the decisions regarding the unconstitutionality of conclusive presumption have been handed down since World War I. No case has been found in which the validity of the exculpatory clauses has been actually challenged.

The development of such a clause coupled with the immense expansion of the Executive Department in recent years presents a serious question of public policy. Upon being furnished an antidote of this kind, the representative of the Executive Department may readily become immune to the inhibitions which normally are expected to restrain the abuse of administrative power and to prevent capricious conduct. Justification by the righteousness of one's conduct is a democratic safeguard that should not be put aside, however convenient an exculpatory clause under certain conditions may prove to be.

Judge Hand expressed a doubt as to whether an exculpatory clause would be valid with respect to an unconstitutional statute. The Government argues that this is avoided by the Congressional power to restrict the presentation of constitutional issues to an exclusive procedure.

But this argument is beside the point. If the vesting power of §5(b)(1) should be declared unconstitutional, another litigation, perhaps between different parties, would be necessary to determine whether the exculpatory clause in §5(b)(2) nevertheless protected persons who had acted pursuant to the unconstitutional provisions of §5(b)(1).

As pointed out in the Silesian main brief (p. 63) the very large amount of litigation which arose under the Trading With the Enemy Act in connection with World War I clearly demonstrates that the bar did not regard the exculpatory clause in §7(e) as a certain safeguard against possible liability.

The Government's Point III

The heading of Point III in the Government's brief refers to the constitutionality of §5(b) but the argument actually relates to the scope of the vesting power in the amendment to that subdivision.

The Debtor has urged a number of arguments in support of its contention that the vesting power in §5(b) is limited to enemy and ally of enemy property. The Government has attempted to answer some of these arguments in Point III of its *Silesian* brief, some have been referred to, as treated in the *Uebersee* brief, and some for one reason or another have been disregarded. The question is basic. The District Court stated, "Whatever may be the interests or rights of the Swiss banks, they cannot be considered here" (R. 49). If, as urged by the Government, the effect of the amendments to §5(b) was to repeal §8(a) so far as it related to friendly aliens, then the decision of the District Court that the rights of the Swiss banks could not be considered by that Court, is correct.

On the other hand, if as claimed by the Debtor, §8(a) and §9(a) as permanent sections of the Act (*Markham v. Cabell*, 326 U. S. 404), have not been repealed as to friendly aliens, it follows that the District Court could not properly dispose of the case without considering the interests and rights of the Swiss banks.

As to the question why the Senate Judiciary Committee, having a copy of Judge Hand's opinion in the *Silesian* case before it, did not undertake to have Congress adopt a statutory declaration of the meaning to be placed upon §5(b), there are several considerations which may have moved Congress to adopt such a course. The Committee filed its report on July 26th, 1946, and Congress had planned to adjourn on July 31st. Probably the deadline had passed for the introduction of new bills. In any event, one would normally expect the Senate Judiciary Committee, after having indicated the construction which it believes should be placed upon the statute, to wait until the question had been passed upon by this Court before taking further action. The Congress should not be expected to legislate to cure decisions of the various Circuit Courts before final review by this Court.

As to the enactment of §32, this section was similar to a statute enacted in 1920 following World War I (41 Stat. 977) and was designed to make it possible for the Custodian to return property that had been seized because it was connected with territory at one time occupied by the enemy, and hence owned by persons who would have been enemies under the 1917 Act (H. Rep. 1269, 79th Cong. 1st Sess., p. 2; S. Rep. 920, 79th Cong. 2nd Sess., p. 1 *seq.*). No special significance can be attached to the fact that the President was authorized to return property belonging to corporations controlled by or 50% of the stock of

which was owned by enemies, because substantially the same provision was contained in §9(b)(11) of the old Act as amended in 1923 (42 Stat. 1513). Government counsel evidently derive their argument on this score from their contention that unless §5(b) is construed in the manner they propose, the Custodian would not have the power to vest the property of a Swiss corporation whose shares were owned by Germans. Counsel do not, however, take this argument very seriously, because they claim that aside from the provisions of §5(b) the seizure by the Custodian of the Silesian shares was also a valid seizure under §7(c). Such an argument necessarily implies that the Custodian could seize the property of a Swiss corporation when its shares were owned by Germans (Government's *Silesian* brief, p. 7).

Silesian urges that the enlargement of the freezing controls contained in the amendment of §5(b) coupled with the existing condemnation and requisition statutes rendered unnecessary a further grant of power, which contrary to long standing American traditions, made an insidious distinction between the property of friendly aliens and American citizens (*Silesian* brief, p. 30). The Government attempts to meet this argument by claiming that by a decision of this Court in *Behn, Meyer & Co. v. Miller* (1925), 266 U. S. 457, and *Hamburg-American Co. v. U. S.* (1928), 277 U. S. 138, this Court held that the property of a corporation which was not organized in enemy territory and which was not actually engaged in business with the enemy could not be seized despite the fact that all the stockholders had been enemies within the definition of the old Act and that the construction of §5(b) proposed by the Government must be adopted so as to enable the Custodian to penetrate certain cloaking

operations which employed corporations organized in foreign non-enemy countries. This argument cannot be sound because if such was the purpose of Congress, why should it have been limited to foreign property? The *Behn* case related to a corporation organized under the laws of a British colony whereas in the *Hamburg-American* case the corporation was organized under the laws of the State of New Jersey. If Congress had desired to circumvent these two cases it was necessary to make the vesting power cover both foreign and domestic property. An examination of the cases themselves, moreover, shows that they do not stand for as broad a rule as claimed by the Government. These cases were decided after Congress in June 1920 generally relaxed the provisions of the Trading With the Enemy Act (41 Stat. 977-979) by adding §9(b) to the statute. Subdivision (6) of the amendment then enacted provided that the President might return property seized by the Custodian if he determined that the owner thereof at the time of seizure was "a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, states or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder." This provision implicitly means that the Custodian at the time held corporations which he had seized and which had stockholders of enemy nationality. Furthermore, §5(b) as amended contains provisions authorizing the President to modify "definitions not inconsistent with the purposes of this subdivision" (*Silesian*

* In 1923 §9(b) (1), was added to the statute (42 Stat. 1513) whereby it was provided that seized property could be returned if the owner at the time of seizure was a corporation of which the control or more than 50% of the voting power was, at the time of seizure and of return, vested in non-enemy persons.

brief, p. 70), and the Custodian was therefore authorized so to define a national of an enemy or ally of enemy foreign country as to include a corporation organized in a neutral country and owned by enemy stockholders. And finally, the definition of enemy corporations in the 1917 statute is either not as rigid as the Government claims, or that definition has been modified through the exercise of the power of definition contained in §5(b), because otherwise it would not be possible for the Government to argue that the vesting order "was an equally appropriate exercise of the power conferred by Section 7(c) of the Act to vest any property belonging to, or held for the benefit of, 'an enemy or ally of enemy'" (Government's *Silesian* brief, p. 7). In the instant case Non-Ferrum, which was the registered owner of the *Silesian* shares, is a Swiss corporation owned by a German corporation and according to the Government's argument this enemy stock ownership did not make Non-Ferrum an enemy or ally of enemy corporation and precluded the property of the corporation from being seized. Hence, if the Government's argument is correct, the Custodian could not seize the shares described in the vesting order.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1947

No. 6

**SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,**

Petitioners,

against

**TOM C. CLARK, Attorney General, as successor to
The Alien Property Custodian,**

Respondent.

**BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

The Narrowing of the Issues

As a result of the re-argument of the *Uebersee* and *Silesian-American* cases and of certain concessions by counsel for the Custodian upon oral argument, considerable clarification and narrowing of issues has resulted.

1. *Markham v. Cabell* (1945), 326 U. S. 404, sets up the principle that the Trading With Enemy Act relating to World War I and the amendment to §5(b) thereof

by First War Powers Act, 1941, must be read as an "integrated whole" and that sections of the earlier Act unless repealed remain as permanent sections. §9(a) and §8(a) are clearly permanent sections. §9(a) was held to be a permanent section by the express opinion of this Court in the *Cabell* case¹ which holding necessarily made §8(a) a permanent section because for purposes of its applicability the wording of §8(a) is identical with §9(a), and moreover, the exemption of pledged property by Congress was purposeful and §5(a) in no way suggested that §8(a) was to be repealed.

2. §8(a), §9(a) and §5(b) as amended in 1941 can be read together, and applied to both *Uebersee* and *Silesian American*.

If the effect of the 1941 amendment was to broaden the Custodian's power so as to permit the unqualified seizure of property of friendly aliens, the Custodian did not exercise such power in framing the vesting order respecting the Silesian American shares. The order by its express terms vested the shares owned by Non-Ferrum for the benefit of a designated enemy. No reference is made to the rights of the Swiss banks in the shares and the order did not pretend to vest the interests of the Swiss banks. Consequently, if §5(b) authorized the seizure of all alien property, these interests were nevertheless unaffected by the Silesian American vesting order. In this respect the *Silesian American* vesting order (R. 14) was entirely different

¹ In the opinion of the Court by Mr. Justice Douglas it was said at p. 411:

"We can find no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §9(a)."

from the vesting order in the *Uebersee* case. The *Uebersee* order vested the property because it was found to be property of a foreign national, whereas the *Silesian* order vested the shares of Non-Ferrum because they were determined to be the property of a national of a designated enemy country.

If the Custodian believes that a particular pledge is a cloaking operation, the Custodian under §5(b) may specifically seize the pledged interest and force the pledgee to a proof of non-enemy taint by requiring the pledgee to sue for recovery under §9(a). That, however, was not the situation in the case at bar and was not done with respect to the interest of the Swiss banks:

Thus any additional power granted by §5(b) would satisfy the Custodian's argument that seizure might be necessary to avoid cloaking the enemy interests in the hands of foreign nationals. This power would give protection to American interests and yet not go to the extreme lengths of confiscation of friendly aliens' property without adequate remedy and without some suggestion of enemy taint. In this manner a construction can be given to §5(b) which will not reverse a long established American policy towards its friends and yet give power of seizure where none existed under the 1917 Act.

There is nothing inconsistent in permitting seizure under §5(b) of a pledged interest in foreign national property otherwise protected under §8(a) if such interest be specifically seized, and in allowing the foreign national the right to show freedom from taint or cloaking under §9(a).

3. Whereas, in *Uebersee* the Custodian had the right to seize, the right equally exists to prove that the entire

property interest belongs to friends whom we treat on an equal footing with our citizens. Hence, §5(b) and §9(a) can stand side by side.

4. Congress in the summer of 1946 refused to deprive friendly aliens of their rights under §9(a). The Custodian however in the *Uebersee* case asks this Court to accomplish for him that which Congress was unwilling to do and which Secretary Byrnes urged would be so detrimental to our foreign policy and property negotiations. This action by Congress was peculiarly significant because the Senate Judiciary Committee had the Circuit Court of Appeals opinion in *Silesian-American* before it and expressly rejected the major premise of that opinion.

5. Coming to §8(a), the same reasons which impressed Congress sufficiently in 1917 to make this section relating to pledged property the only exception from seizure in the entire Act must have existed with equal or greater force in 1941. Congress did not repeal §8(a). Nor is there any such irreconcilable conflict as to require judicial repeal.

Judge Hand's reasoning that §8(a) no longer applied was based solely upon his premises that a friendly alien had no rights under §9(a). The continued existence of §9(a) and the affirmance of the *Uebersee* case would give a *fortiori* vitality to §8(a).

5. Applying these principles to *Silesian-American* how do they work in practice? Factually, the corporation being in reorganization and under the supervision of the United States District Court for the Southern District of New York, the record in that court must control. From the Trustee's report and the Vesting Order certain facts are known:

A. The certificates for the shares in question are physically lodged in Switzerland with Swiss banks as pledgees to secure loans (R. 7-28, 45 seq.). 6

B. The equity interest is owned by Non-Ferrum, a Swiss corporation said by the Custodian to be controlled by an enemy (R. 6).

C. Before the war the shares were pledged with the Swiss banks to secure a substantial loan (R. 7, 41, 45 seq.).

6. The Vesting Order is directed only against Non-Ferrum. There has been no attempted seizure by the Custodian of the pledge interest of the Swiss banks. Nevertheless when the Custodian seeks to compel Silesian-American to cancel the certificates now held by the Swiss and to issue new certificates to him, he, for all practical purposes, without seizure or vesting or any claim of right, destroys the property held by the Swiss under the guise of taking Non-Ferrum property.

7. If the Custodian believes that the interests of the Swiss banks as pledgees are enemy tainted even though in the name of a friendly foreign national, the Custodian should have vested that interest under §5(b) as amended. The Swiss banks could then come in under §9(a) if they desired and have their rights adjudicated. But the Custodian has made no such seizure or vesting order.

8. The Vesting Order is restricted solely to Non-Ferrum's interest. *Silesian-American* does not dispute the Custodian's right to vest that interest. It does seriously dispute the order of the District Court directing it to satisfy the seizure of Non-Ferrum's interest by action which in effect

accomplishes the destruction or the turning over of the Swiss banks' property. The effect of the order below is to cause to be outstanding two unrestricted and unqualified certificates for the same shares. Cancellation on the stock books cannot prevent the circulation of these duplicate sets of certificates with possible double liability of the issuing corporation, perhaps in a Swiss or other foreign court.

9. Confusion and possible liability to Silesian-American can be avoided by adapting the relief within the provisions of §8(a), §9(a) and §5(b) as amended and regarding the 1917 Act as amended in 1941 as an "integrated whole".

A. Since the interest of Non-Ferrum only has been sought to be vested by the Custodian that interest only should be taken. This could be evidenced by certificates bearing on their face a notation or statement of the pledge interest. Thus two sets of "clean" certificates would not be outstanding at the same time and Silesian-American could never be charged with issuing duplicates in violation of its by-laws and the Stock Transfer Act.

B. If as indicated on oral argument certificates presently in the hands of American pledgees would be exempt from seizure because of §8(a), this Court might well remand the case to the District Court to await the event of seizure (if ever such seizure is made) by the Custodian of the Swiss banks' interest as a foreign national under §5(b). The District Court could then make such an order as to the turning over of the pledge interest as might be appropriate with respect to such interest.

(C) In any event, the holding by the District Court that "whatever may be the interests of the Swiss Banks,

they cannot be considered here" (R. 49) was erroneous, because ~~the~~ provisions of §8(a) required the Court to ascertain the nature of this interest.

10. In taking this position Silesian-American is not espousing the cause of the Swiss banks or Non-Ferrum or any other party. It is in the predicament of having been ordered to do an act which, it believes, is not warranted either by the Vesting Order, by §8(a) or even §5(b) as amended. The issuance of the new certificates as ordered does not appear to be authorized under the law and is plainly inconsistent with the facts.

Silesian-American respectfully requests this Court for the corporation's protection to remand the case to the District Court: (1) to await such action as the custodian may take against the Swiss banks; or (2) to direct the issuance of restricted certificates endorsed so as to give notice as to the existence of this pledge; or (3) to take evidence and determine the nature of the pledge.

***The Major Premise in the Opinion of the Court Below
Has Been Rejected by Congress and by Subsequent
Judicial Determinations***

In his opinion below Judge Hand conceded that during World War I by reason of the provisions of §8(a) the Alien Property Custodian did not have power to seize enemy property held by friendly aliens as pledgees with power of sale (R. 67).

In order to arrive at different result with respect to World War II, Judge Hand adopted as his major premise the proposition that a friendly alien could not recover under

§9(a) possession of property seized by the Custodian because of the amendment to §5(b) in 1941 (R. 66 bottom). And such being the case, he concluded that it would be "irrational" to allow a friendly alien pledgee to retain under §8(a) enemy property held in pledge (R. 68 top).

In other words, Judge Hand held that a friendly alien pledgee could not under §8(a) retain possession of enemy property pledged with him for the simple reason that a friendly alien could not under §9(a) successfully recover property seized by the Custodian.

Judge Hand's opinion was handed down July 3, 1946. Shortly thereafter, the Senate Judiciary Committee, with a copy of the opinion before it, refused to approve an amendment to the statute designed to give legislative sanction to the major premise of Judge Hand's opinion, and expressly indicated the belief that the amendment to §5(b) in 1941 had not deprived a friendly alien of the right under §9(a) to recover property seized by the Custodian. This position was approved by the Senate (Petitioners' brief, p. 36) and the House of Representatives acquiesced in this conclusion (Petitioners' brief, p. 37).

Thereafter the Court of Appeals for the District of Columbia in the *Uebersee* case also rejected Judge Hand's major premise that a friendly alien cannot under §9(a) recover possession of seized property.

More recently in the case of *Standard Oil Company et al. v. Clark* (as yet unreported,²) the Circuit Court of Appeals for the Second Circuit approved the conclusion of Mr. Justice Groner in the *Uebersee* case to the effect that §5(b) as

² The pertinent portions of the opinion are set forth at pp. 2-5 of Respondent's Second Supplemental Memorandum in the *Uebersee* case.

amended has not deprived a friendly alien of his right to recover under §9(a) seized property of a non-enemy character. The opinion in the *Standard Oil Company* case was written by Judge Clark, who was a member of the Court which promulgated the opinion of Judge Hand in the *Silesian-American* case.

Not long before the *Standard Oil Company* decision, a similar view had been adopted by the United District Court for the Southern District of New York, in *Swiss Bank Corporation v. Clark*, where the opinion was written by Judge Bright. In that case a Swiss bank holding as pledgee shares of a New Jersey corporation sued under §9(a) to have cancelled the duplicate stock certificates that had been issued by the New Jersey corporation to the Custodian on the latter's demand. The Custodian moved for judgment on the pleading. In denying the motion, Judge Bright adopted the view of Mr. Chief Justice Groner in the *Uebersee* case and said that the decision of the Circuit Court of Appeals for the Second Circuit in the *Silesian-American* case was not controlling. The full opinion of Judge Bright may be found in the appendix (pp. 8 seq.) to Mr. Connor's Second Supplemental Memorandum for the respondent in the *Uebersee* case.

Prior to the *Standard Oil Company* and *Swiss Bank Corporation* decisions the Yale Law Journal for June 1947 (56 Yale L. J. 1068) had examined the opinions in both the *Uebersee* and the *Silesian-American* cases and had concluded at page 1076:

"The view of section 5(b) and 9(a) adopted in the *Uebersee* case, permitting alien friends to sue for the return of their property, would thus seem to accord more faithfully with legislative intent, constitutional

principles and enlightened self-interest than the interpretation placed on those sections in the *Silesian-American* case."

The Columbia Law Review in its issue for September 1947 (47 Col., L. R. 1052) attempted to arrive at a different conclusion but conceded at page 1060:

"It is true that the policy considerations involved seem to argue on the whole against such a construction [as adopted by Judge Hand]. It has long been American policy to accord alien friends, wherever possible, the same treatment given our own citizens. This policy has been embodied in treaties, one of which, with Switzerland, may have a direct bearing on the *Uebersee* and *Silesian* cases. Undeniably, allowing American citizens the right to recover their property in kind while relegating a non-enemy to a suit for compensation, is discriminatory. Furthermore, Congress in 1946, evidently believing 9(a) to be still available to a non-enemy, twice refused to reamend the act specifically to limit alien friends to a suit for compensation. In addition, a decision now that the alien friend can recover his property in specie would neither disrupt the war effort, nor foreclose Congress from taking over non-enemy property in a future emergency."

The Review endeavored to dispose of these policy considerations by the observation "policy considerations, however weighty, should not be employed to override the mandate of the legislature in a field where the wisdom of its course of action may not be questioned by the judiciary." Thus the learned editor of the Law Review ended by assuming that which he started out to prove, viz., that Congress intended by §5(b) to repeal §9(a) so far as it related to

friendly aliens. He also conveniently ignored the rule frequently enunciated by this court that repeal by implication is not favored (Petitioners' brief, p. 40); that an intent by Congress to violate an important article of a treaty with a foreign power must be clearly and unequivocally manifested (Petitioners' brief, p. 43). Furthermore, on the basis of an uncertain and at best highly ambiguous Congressional enactment he would discard a long-standing principal of American policy whereby no distinction has been made between friendly aliens and American citizens so far as property rights are concerned, and substitute in the place thereof a totalitarian concept whereby friendly aliens become the victims of unnecessary discrimination. Friendly aliens may justly become alarmed at the prospect of having their American properties in an alleged emergency seized by the United States Government and sold to American competitors, with no relief except a right to recover the fair market value of the properties as determined in an expensive and notoriously unsatisfactory proceeding before the Court of Claims.

Respectfully submitted,

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AUG 27 1946

CHARLES E. LUGGIE GRIFFLEY
JUL 1946

No. 346

In the Supreme Court of the United States

OCTOBER TERM, 1946

**SILESIAN AMERICAN CORPORATION, DEBTOR, AND
SILESIAN HOLDING COMPANY, PETITIONERS**

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1*
Statutes and executive orders involved	2
Questions presented	2
Statement	2
Argument	4
Conclusion	16
Appendix	17

CITATIONS

Cases:

<i>Alexewicz v. General Aniline and Film Corp.</i> , 181 Misc. 181	14
<i>Becker Steel Co. v. Cummings</i> , 296 U. S. 74	8
<i>Campbell v. Chase Nat. Bank</i> , 5 F. Supp. 156, affirmed, 71 F. (2d) 669, certiorari denied, 293 U. S. 592	13
<i>Central Union Trust Co. v. Garvan</i> , 254 U. S. 554	7
<i>Cummings v. Deutsche Bank</i> , 300 U. S. 115	9
<i>Draeger Shipping Co. v. Crowley</i> , 49 F. Supp. 215, 55 F. Supp. 906	5
<i>Duisberg v. Crowley</i> , 54 F. Supp. 365	5
<i>Escher v. United States</i> , 68 C. Cls. 473, certiorari denied, 281 U. S. 752	10
<i>Hayden v. Crowley</i> , (Unreported—W. D. Wash., May 10, 1944, affirmed on rehearing July 10, 1944)	5
<i>Iki v. Crowley</i> , (Unreported—W. D. Wash., May 10, 1944, affirmed on rehearing July 10, 1944)	5
<i>Kahn v. Garvan</i> , 263 Fed. 909	15
<i>Markham v. Allen</i> , 326 U. S. 490	15
<i>Markham v. Cabell</i> , 326 U. S. 404	14
<i>New York Central Securities Corp. v. United States</i> , 287 U. S. 12	12
<i>Pfueger v. United States</i> , 121 F. (2d) 732, certiorari denied, 314 U. S. 617	10, 11
<i>Stoehr v. Wallace</i> , 255 U. S. 239	9
<i>Uebersee Finanz-Korporation v. Markham</i> , (Unreported—Dist. Ct. of U. S. for D. C., September 21, 1945)	5, 6
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U. S. 304	12
<i>United States v. Von Clemm</i> , 136 F. (2d) 968, certiorari denied, 320 U. S. 769	14
<i>Yearsley v. Ross Construction Co.</i> , 309 U. S. 18	8

Constitution, Treaty, and Statutes:		Page
Constitution, Fifth Amendment		8
Treaty of Friendship, Commerce and Extradition with Switzerland, November 25, 1850; 11 Stat. 587 (1850)		9
Bankruptcy Act, Chapter X, 11 U. S. C. 501 <i>et seq.</i>		3
Tucker Act, 24 Stat. 505, 28 U. S. C. §§ 41 (20), 250		8
Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. 1-31:		
Section 5 (b)	4, 5, 6, 8, 11, 14, 16, 17	
Section 7 (c)	8, 9, 10, 19	
Section 7 (e)	6, 16, 20	
Section 8 (a)	14, 15, 20	
Section 9 (a)	4, 5, 6, 21	
Deficiency Appropriation Act of Nov. 4, 1918, 40 Stat. 1020		19
Act of March 4, 1923, c. 285, 42 Stat. 1511		21
Act of March 9, 1933, 48 Stat. 1		13
Joint Resolution of May 7, 1940, 54 Stat. 179		11, 14
First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V, § 5 (b)	4, 10, 14, 17	
Judicial Code, Section 153, 28 U. S. C. 259		9
Miscellaneous:		
Executive Order No. 8389, April 10, 1940, 5 F. R. 1400	11, 12, 23	
Executive Order No. 8785, June 14, 1941, 6 F. R. 2897	11, 12, 23	
Executive Order No. 9193, July 6, 1942, 7 F. R. 5205	11, 12, 13, 24	
Vesting Order No. 370, 8 F. R. 33	3, 11, 13	

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v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 49) is not reported. The opinion of the Circuit Court of Appeals (R. 63-69) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 69) was entered on July 3, 1946. The petition for writ of certiorari was filed August 2, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the Trading with the Enemy Act, as amended, and of Executive Orders issued thereunder, are set forth in the Appendix, *infra*, pp. 17-25.

QUESTIONS PRESENTED

1. Whether the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, and as implemented by executive orders issued thereunder, involves an unconstitutional delegation of legislative powers.

2. Whether a constitutionally adequate remedy is available to a non-enemy foreign national whose property has been vested pursuant to the Trading with the Enemy Act, as amended by the First War Powers Act, 1941.

3. Whether, under Section 8 (a) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, the issuer of stock certificates representing shares which the Alien Property Custodian has vested, may refuse to cancel the outstanding certificates and to issue new ones to the Custodian on the ground that the shares are held in pledge by persons who are non-enemy foreign nationals.

STATEMENT

Petitioner Silesian American Corporation is the debtor in proceedings for corporate reorganization brought in the District Court on July 29,

1941, pursuant to Chapter X of the Bankruptcy Act, 11 U. S. C. 501 *et seq.* (R. 1, 34). Petitioner Silesian American Holding Company is the holder of the majority of the outstanding shares of the debtor's common and preferred stock (R. 5).

On November 17, 1942, the Alien Property Custodian, the respondent, issued Vesting Order No. 370, 8 F. R. 33 (R. 14-15). By that Order, he vested in himself 50,000 shares (41.67%) of the debtor's preferred stock and 98,000 shares (49%) of its common stock, upon findings that the shares were held by a Swiss corporation for the benefit of a German corporation and that it was necessary in the national interest to vest them. A copy of this Order was served on the debtor (R. 16), and by subsequent letter the debtor was directed to cancel on its books the outstanding certificates representing the vested shares and to issue new certificates to the Custodian (R. 16-17). The debtor thereupon filed a petition in the bankruptcy proceeding for instructions whether to comply with this direction (R. 5-13). From the debtor's petition for instructions, and from affidavits filed in the District Court, it appeared that certain Swiss banks asserted that the shares vested by the Custodian had been pledged to them as security for loans (R. 7, 49).¹

¹ The assertion was also made that the Swiss banks were the full and unqualified owners of the shares (R. 18-19, 26). This assertion appears to have been abandoned in all of the appellate proceedings. (See Pet. 5, 16, 18.)

These banks announced their intention of holding the debtor and its trustee liable for any action which either might take to their prejudice (R. 27-8). The District Court, after hearing argument on the return to a show cause order issued on this petition, declined to consider whether the Swiss banks owned any interest in the vested shares (R. 49), and entered an order directing the debtor to cancel the outstanding certificates and to issue new certificates as directed by the Custodian (R. 50-51). Although the Swiss banks were represented by counsel at the hearing in the District Court (R. 50), they did not appeal from its decision (R. 64). The present petitioners appealed, and the Circuit Court of Appeals affirmed the District Court's order (R. 69).

ARGUMENT

1. As it existed in World War I, the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. 1-31, authorized the seizure of property of enemies and allies of enemies. Section 9 (a) of the Act authorized "any person not an enemy or ally of enemy" to sue for the recovery from the Alien Property Custodian of any property to which he could "establish" that he was "entitled." By the First War Powers Act, 1941, c. 593, 55 Stat. 839, Congress amended Section 5 (b) of the Act so as to authorize the vesting of "any property or interest of *any foreign country* or national thereof." Every court that has had

occasion to consider the question has held that the effect of this amendment was to preclude a foreign national, as defined pursuant to Section 5 (b), from recovering any property or interest in a suit under Section 9 (a). *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215, 219 (S. D. N. Y.), 55 F. Supp. 906, 914 (S. D. N. Y.); *Uebersee Finanz-Korporation v. Markham*, Dist. Ct. of the U. S. for the D. C., Sept. 21, 1945, now pending on appeal before the U. S. Court of Appeals for the District of Columbia;² *Iki v. Crowley*, W. D. Wash., May 10, 1944, and on rehearing, July 10, 1944;³ *Hayden v. Crowley*, W. D. Wash., May 10, 1944, and on rehearing, July 10, 1944.⁴ See *Duisberg v. Crowley*, 54 F. Supp. 365 (D. N. J.). As the court below indicated

² In this case the United States moved to dismiss a complaint under Section 9 (a) for the return of property, on the ground that it appeared on the face of the complaint that the plaintiff was a national of Switzerland. The district court granted the motion without opinion.

³ In this case Black, D. J., handed down the following opinion:

"After consideration of the very comprehensive briefs in behalf of each party which supplement the oral arguments which were submitted, and regardless of whether or not the complaint is or is not otherwise sufficient I am satisfied that it is essential that the plaintiff affirmatively allege that he is not a national of a foreign or enemy country. Such allegation is not now present.

"For such reason in any event the defendants' motion to dismiss should be granted."

⁴ This case was disposed of by an opinion identical with that in *Iki v. Crowley*, *supra*, note 3.

(R. 67), while a foreign national has capacity to sue under Section 9 (a), he cannot "establish" that he is "entitled" (as the terms of the section require) to the property sued for if that property was vested by an order which Congress has authorized by Section 5 (b).

The court below rightly held, however, that it was unnecessary to decide this issue.³ For the petitioners assert no interest in the vested shares; their sole interest lies in a supposed possibility that the debtor would be liable to the Swiss banks should it comply with the Custodian's direction to cancel and issue certificates. Against any such possibility the petitioners are fully protected by the terms of Sections 5 (b) (2) and 7 (e) of the Act. Section 5 (b) (2), *infra*, p. 18, provides that any transfer of property made to the United States or as otherwise directed pursuant to Section 5 (b) "shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same," and that "no person shall be held liable in any court for or in respect to anything done or omitted in good faith" in reliance on any instruction or direction issued under that section. The exculpatory provisions of Section 7 (e), *infra*, p. 20, are substantially similar.

³ The issue is squarely presented for decision in *Uebersee Finanz-Korporation v. Markham*, which was argued on May 28, 1946, before the U. S. Court of Appeals for the District of Columbia, and is presently awaiting decision.

It may be doubted whether the Swiss banks, who appeared in the District Court and elected not to appeal from its order, could under any circumstance hold the debtor liable for complying with that order. But it is evident that the debtor can be subjected to liability, if at all, only on the assumption that these provisions of Sections 5 (b) and 7 (c) are of no effect because of the asserted unconstitutionality of the statutory scheme of which they are a part. The petitioners assert that the Act is unconstitutional as to the Swiss banks on the ground that it fails to afford those banks a constitutionally adequate remedy for the taking of their property by the Vesting Order. The question whether a foreign national may sue for return under Section 9 (a) is thus presented in this suit only to the extent that it becomes relevant to the determination whether a foreign national has such a constitutionally adequate remedy. If, as the petitioners appear to contend, a foreign national must be allowed to recover in a suit under Section 9 (a), all constitutional requirements are satisfied and the petitioners have no standing to object to the order of the District Court. *Central Union Trust Co. v. Garvan*, 254 U. S. 554. If, on the other hand, as the Government contends; it be held that a foreign national may not recover under Section 9 (a), there is nevertheless available to the Swiss banks a fully adequate remedy by way of a suit for just compensation under the

Tucker Act, 28 U. S. C. 41 (20), 250. Under either construction of the Act, therefore, the petitioners are protected by the exculpatory provision of Sections 5 (b) and 7 (c) and they accordingly have no justiciable interest in the question of which is the proper construction.

The decision below that the remedy of just compensation is available to the Swiss banks presents no issue calling for further review. That decision was founded upon the well-established principle that a taking by the United States of property which is protected by the guarantee of the Fifth Amendment gives rise to an implied promise on the part of the United States to pay just compensation which can form the basis for a suit under the Tucker Act. *Yearsley v. Ross Construction Co.*, 309 U. S. 18, 21. If the property of the Swiss banks is entitled to that protection, there can be no doubt that a remedy of just compensation fully satisfies the constitutional requirement. As this Court indicated in *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79, the summary seizure of property authorized by the Trading with the Enemy Act is clearly constitutional if there is provided a remedy "adequate to secure to the non-enemy owner either the return of his property or compensation for it."

The petitioners assert that they will be precluded from suing in the Court of Claims under the Tucker Act for two reasons. The first is

Section 153 of the Judicial Code, 28 U. S. C. 259, which provides that the jurisdiction of the Court of Claims, "shall not extend to any claim against the Government * * * growing out of or dependent on any treaty stipulation entered into with foreign nations * * *." They assert that the Swiss banks are entitled to protection for their property by reason of Article I of the Treaty of Friendship and Commerce of 1850 with Switzerland, 11 Stat. 587, and they suggest that because the claim of those banks might derive in part from the Treaty, this section would preclude suit in the Court of Claims. But it is apparent that the protection of constitutional rights depends not upon the Treaty but upon the Fifth Amendment, and hence any suit of the Swiss banks under the Tucker Act need in no sense be a claim growing out of or dependent upon the treaty provisions.

In the second place, the petitioners rely on the fourth paragraph of Section 7 (c), *infra*, pp. 19-20, which provides that the "sole relief and remedy of any person having any claim to any money or other property" transferred to the Custodian "shall be that provided by the terms of this Act."

This provision was enacted at a time when the power of seizure was limited to enemy and ally-of-enemy property, which could constitutionally be subjected to confiscation. *Stoehr v. Wallace*, 255 U. S. 239; *Cummings v. Deutsche Bank*, 300

U. S. 115. At that time the statutory remedy of return was thus available as to all property which was entitled to the protection of the Fifth Amendment. Section 7 (c) would appear to be clearly inapplicable to cases where, as a result of the expansion of the vesting power in 1941 to include all foreign property, the Act provides no express remedy for a seizure of constitutionally protected property. The claim of the Swiss banks in a suit under the Tucker Act would not be a "claim to money or other property" transferred to the Custodian; it would rest on the exactly contrary assumption that the property transferred had irrevocably passed beyond all power to recover it, and that the United States, because it had thus taken unqualified title, was bound by an implied promise to pay just compensation.

The decision of the Circuit Court of Appeals on this issue is correct and petitioners assert no conflict with any other decision of any court.* Moreover, while the question as such may be of

* The question as to the availability of a suit under the Tucker Act for just compensation for property vested by the Alien Property Custodian has not, except for the decision below, been adjudicated subsequent to the amendment of the Act by the First War Powers Act, 1941. Under the Act as it stood prior to that amendment, some decisions indicated that a suit for just compensation founded upon a seizure of property of the Custodian could not be maintained. *Pfueger v. United States*, 121 F. (2d) 732 (App. D. C.), certiorari denied, 314 U. S. 617; *Escherich v. United States*, 68 C. Cls. 473, certiorari denied, 281 U. S. 752. In both cases the plaintiffs had already obtained relief under Sec. 9 (a); no question was presented, therefore, as to the right to sue for just compensation in cases where Sec. 9 (a) was inapplicable.

importance it is only obliquely involved in the present case;

2. Petitioners argue (Pet. 26-30) that they are relieved from the duty of complying with the Custodian's direction to cancel and issue certificates because Section 5 (b) of the Trading with the Enemy Act involves in its operation an unconstitutional delegation of legislative power in that no adequate standard is afforded to guide the exercise of the vesting power. This contention also presents no issue calling for further review. Section 5 (b) states explicitly both the powers conferred and the subject matter—property of a foreign country or a national thereof⁷—on which they are to operate. In dealing with the field of foreign relations in time of war,⁸

⁷ While the Act does not define these terms, they are defined in detail by the applicable executive orders. (See Section 5 of Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897, *infra*, pp. 23-24, made applicable to the exercise by the Custodian of the vesting power by Section 10 of Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, *infra*, pp. 24-25.) The definitions in their original form were expressly ratified by the Joint Resolution of May 7, 1940, 54 Stat. 179. The amended definitions presently in effect do not differ in essence from the original definitions and were in force when the First War Powers Act was passed. Moreover, the President's power to prescribe definitions is limited by the requirement of Section 5 (b) (3) that the definitions be "not inconsistent with the purposes of this subdivision."

⁸ Since Vesting Order No. 370 was issued during time of war, it is unnecessary here to consider problems which might

Congress was not required to state with rigid precision the occasion for the exercise of the powers conferred. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304. Thus, the Trading with the Enemy Act as it existed during the First World War contained no statement of the occasion for the exercise of the power to seize enemy property, yet in the many cases in this Court sustaining its validity it was never suggested that it involved an improper delegation of legislative power. In any event, the Custodian's exercise of the vesting power is in practice circumscribed by the requirement of Executive Order No. 9193, July 6, 1942, 7 E. R. 5205, that its exercise be found "necessary in the national interest." Such a requirement affords, under the circumstances, a sufficient standard for the guidance of administrative discretion in the application of stated powers to a stated subject matter. Cf. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24-25.

The petitioners also suggest (Pet. 9-10) that the definition of "foreign national" contained in Executive Order No. 9193 renders the statutory scheme invalid because it confers on the Custodian the authority to declare a person to be a "national of a designated enemy country" upon a finding arise from the exercise of the vesting power in a time of emergency short of war.

* Under Executive Order No. 9193 a distinction is drawn between those foreign nationals as defined in Executive Order No. 8389, as amended (see note 7, *supra*), who are "nationals of a designated enemy country" and those who are

that the national interest requires him so to be treated. The suggestion misconceives the effect of Section 10 of Executive Order No. 9193. Under that section persons who are nationals of a foreign country which is a designated enemy country, but who are not physically within that enemy country, are to be treated as "nationals of a designated enemy country" only upon a finding by the Custodian that the national interest requires that they be so treated. In short the section creates an exception from the normally applicable definition, based on physical absence from the enemy country, and allows the Custodian to remove that exception upon a finding that the national interest requires that it be removed. The Custodian's power is thus circumscribed by the basic definition of "national," and there is no prohibited uncertainty in conferring upon him discretion to remove an exception from that definition.

The Circuit Court of Appeals' holding on the question of delegation is thus correct. There is no conflict of authorities; indeed the decision is in accord with a series of decisions involving Section 5 (b). See as to Section 5 (b) as amended by the Act of March 9, 1933, 48 Stat. 1, *Campbell v. Chase Nat. Bank*, 5 F. Supp. 156, 172-4 (S. D. N. Y.), affirmed, 71 F. (2d) 669 (C. C. A. 2), certiorari denied, 293 U. S. 592; as further

nationals only of a foreign country. Property of the former may generally be vested; property of the latter may be vested only if it falls within certain specified categories. Vesting Order No. 370 vested the shares here in suit as property of a "national of a designated enemy country."

amended by the Joint Resolution of May 7, 1940 (54 Stat. 179), *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2), certiorari denied, 320 U. S. 769; and as further amended by the First War Powers Act, 1941, *Alexewicz v. General Aniline and Film Corp.*, 181 Misc. 181, 193, 43 N. Y. S. (2d) 713, 726.

3. Petitioners assert that Section 8 (a) of the Act, *infra*, pp. 20-21, conferred upon them a right to retain possession of the certificates. That section in terms permits certain types of pledgees of enemy interests to retain the pledged property and dispose of it upon default. The Circuit Court of Appeals correctly held that as a result of the 1941 amendments a foreign national cannot by reliance on Section 8 (a) delay the Custodian's reduction to possession of vested property. This Court, in *Markham v. Cabell*, 326 U. S. 404, declared that Section 5 (b) and the other provisions of the Act must not be read in isolation but "were designed to function as parts of an integrated whole" (p. 411), so that rights conferred by other sections as they existed prior to the 1941 amendments survive if they do not "collide[s] with the policy of Section 5 (b)" (p. 413). Here there is such a collision if Section 8 (a) is construed to exempt from seizure pledge interests held by foreign nationals, although Section 5 (b) has subjected all property of foreign nationals to seizure.¹⁰

¹⁰ If the Custodian had desired to leave the pledge undisturbed, he could have vested the property subject to the

But even if the court below were wrong, the petitioners still could not prevail on this issue. The present record contains no allegation that the asserted pledges of the Swiss banks "may be disposed of on notice or presentation or demand" as Section 8 (a) requires as a condition to its applicability. And in any event these petitioners can claim no rights under Section 8 (a) and can show no injury arising out of the construction which has been given to that section by the Circuit Court of Appeals. Section 8 (a) confers upon a pledgee the right to continue to hold the pledged property; it confers no right on persons who, like the petitioners, assert no interest of any kind in the property. As the court below pointed out (R. 64), the debtor is not here as the representative of the Swiss pledgees of its shares. Its sole interest is in avoiding liability to the Swiss banks. Once it is accepted that the statutory scheme is not unconstitutional as to those banks, the petitioners are fully protected from any liability to them by the provisions of Sections

pledge or vested merely all interest of the pledgor in the property. The Custodian has frequently issued vesting orders which vested "all right, title, and interest" of a designated person in specified property, rather than vesting the property itself. See *Markham v. Allen*, 326 U. S. 490; *Kahn v. Garvan*, 263 Fed. 909 (S. D. N. Y.). His determination here to vest the property itself may be taken as a conclusion that the national interest required the vesting and reduction to possession of all interests in the property—whether of pledge or lien or otherwise—which were subject to the vesting power.

5 (b) (2) and 7 (e). The petitioners cannot be subjected to liability by reason of a decision adverse to the interests of those banks on a question of the availability of a special statutory privilege which those banks have not claimed in these appellate proceedings.

CONCLUSION

The decision below is correct on all points and there is no conflict of authorities. Moreover, the petitioners' interest in the subject matter of the litigation is highly remote; they are mere stakeholders who have standing, if at all, only because of a feared liability to others who have elected not to appeal in this proceeding. The petition for a writ of certiorari therefore should be denied.

Respectfully submitted.

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AUGUST 1946.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-31):

SEC. 5 (as amended by the First War Powers Act of 1941 c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b)):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent, or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the

terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and

concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision.

SECTION 7.

(c) (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter con-

veyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. * * *

SEC. 8. (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property

in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

SEC. 9. (a) (as amended by the Act of March 4, 1923, c. 285, 42 Stat. 1511) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property

or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him, or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant

of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Executive Order No. 8389, April 10, 1940,
5 F. R. 1400, as amended by Executive Order
No. 8785, June 14, 1941, 6 F. R. 2897:

SECTION 5. * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign coun-

try and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

Executive Order No. 9193, July 6, 1942, 7 F. R. 5205:

* * * * *

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

* * * * *

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended.

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CHARLES CLARK, DEPUTY
CLERK

No. 346

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In the Supreme Court of the United States

OCTOBER TERM, 1946

SILESIAN AMERICAN CORPORATION, DEBTOR, AND
SILESIAN HOLDING COMPANY, PETITIONERS

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUC-
CESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	5
Argument	6
I. Petitioners must yield to the Custodian's demand for the property unless the statute specifically authorizes them to refuse	9
II. Regardless of what rights a pledgee may have, petitioners have no standing to resist the Custodian's demand	12
A. Assuming that Section 8 (a) gives the alleged pledgees rights which may be asserted here, those rights are personal and may not be asserted by petitioners	12
B. Neither the pleadings nor the evidence in this case establish that anyone is entitled to claim the rights which petitioners endeavor to assert	16
C. Petitioners' fears that the debtor may be held liable to the Swiss banks for obeying the directions of the Custodian are groundless	18
III. The petitioners' objections to the constitutionality of Section 5. (b) are without substance	24
Conclusion	33
Appendix	34

CITATIONS

Cases:	
Adams v. Milwaukee, 228 U. S. 572	23
Ahrenfeldt v. Miller, 262 U. S. 60	23
Alezwicz v. General Aniline and Film Corp., 181 Misc. 181, 43 N. Y. S. 2d 713	32
American Exchange National Bank v. Garvan, 253 Fed. 43	10, 21
Application of Alien Property Custodian, 60 N. Y. S. 2d 897	11
Barnett, In re, 124 F. 2d 1005	15
Becker Steel Co. v. Cummings, 296 U. S. 74	24
Bowles v. Willingham, 321 U. S. 503	30, 31
Burco, Inc. v. Whitworth, 81 F. 2d 721, certiorari denied, 297 U. S. 724	14
Campbell v. Chase National Bank, 5 F. Supp. 156, affirmed, 71 F. 2d 669, certiorari denied, 293 U. S. 592	32
Central Union Trust Co. v. Garvan, 254 U. S. 554	9, 10, 23

II

Cases—Continued

	Page
<i>City Bank Farmers Trust Co. v. Smith</i> , 263 N. Y. 292, 189 N. E. 222.....	18
<i>Columbia Brewing Co. v. Miller</i> , 281 Fed. 289.....	8, 20
<i>Commercial Trust Co. v. Miller</i> , 262 U. S. 51.....	9, 10, 22, 24, 28
<i>Dana v. Securities & Exchange Commission</i> , 125 F. 2d 542.....	14
<i>Dodge v. Osborn</i> , 240 U. S. 118.....	22
<i>Farmers' Loan & Trust Co. v. Hicks</i> , 9 F. 2d 848.....	20
<i>Fishgold v. Sullivan Drydock Corp.</i> , 328 U. S. 275.....	15
<i>Flournoy v. Wiener</i> , 321 U. S. 253.....	18
<i>Garvan v. \$50,000 Bonds</i> , unreported (S. D. N. Y.), affirmed, 265 Fed. 477, affirmed sub nom. <i>Central Union Trust Co. v. Garvan</i> , 254 U. S. 554.....	16
<i>Garvan v. Marconi Wireless Telegraph Co.</i> , 275 Fed. 486.....	8, 20
<i>General Pictures Corp. v. Western Electric Co.</i> , 304 U. S. 175.....	18
<i>Great Northern Ry. Co. v. Sutherland</i> , 273 U. S. 182.....	8, 20
<i>Hartmann v. Federal Reserve Bank of Philadelphia</i> , 55 F. Supp. 801.....	32
<i>Hartmann v. United States</i> , 86 C. Cls. 579.....	27
<i>Hicks v. Baltimore & O. R. Co.</i> , 10 F. 2d 606.....	8, 20
<i>Hunter v. Central Union Trust Co.</i> , 17 F. 2d 174.....	28
<i>Kahn v. Garvan</i> , 263 Fed. 909.....	10, 20
<i>Kind v. Clark</i> , C. C. A. 2, April 9, 1947.....	15
<i>Lobsiger v. United States</i> , 5 C. Cls. 687.....	27
<i>Mayer v. Garvan</i> , 278 Fed. 27.....	15
<i>Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft</i> , 283 Fed. 746.....	8, 20
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41.....	22
<i>National Licorice Co. v. Labor Board</i> , 309 U. S. 350.....	18
<i>Phillips v. Commissioner</i> , 283 U. S. 589.....	22
<i>Russian Volunteer Fleet v. United States</i> , 282 U. S. 481.....	27
<i>Salamandra Ins. Co. v. New York Life Ins. & Trust Co.</i> , 254 Fed. 852.....	10, 22
<i>Sarazin v. Wright Aeronautical Corp.</i> , 54 F. Supp. 244.....	11
<i>Snyder v. Marks</i> , 109 U. S. 189.....	22
<i>Standard Oil Co. v. Markham</i> , 64 F. Supp. 656.....	15
<i>Stern v. Newton</i> , 180 Misc. 241, 39 N. Y. S. 2d 593.....	11
<i>Stoehr v. Wallace</i> , 255 U. S. 239.....	7, 9, 24, 28
<i>Sutherland, In re</i> , 23 F. 2d 595.....	20
<i>Tyler v. Judges of Court of Registration</i> , 179 U. S. 405.....	22
<i>United States v. The Antoinette</i> , 153 F. 2d 138, certiorari denied, 328 U. S. 863.....	11
<i>United States v. Cohen Grocery Co.</i> , 255 U. S. 81.....	29
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U. S. 304.....	31
<i>United States v. Guaranty Trust Co. of New York</i> , 76 F. 2d 747.....	19
<i>United States v. Von Clemm</i> , 136 F. 2d 968, certiorari denied, 320 U. S. 769.....	32
<i>United States Trust Co. v. Miller</i> , 262 U. S. 58.....	23

III

Cases—Continued

	Page
<i>Wageck v. Travelers Insurance Co.</i> , 108 Miss. 65, 177 N. Y. S. 327	20
<i>Yakus v. United States</i> , 321 U. S. 414	22, 31
<i>Yokohama Specie Bank, In re</i> , 66 N. Y. S. 2d 289	11
<i>Young v. Higbee Co.</i> , 324 U. S. 204	14
Statutes, treaties, executive and vesting orders:	
Act of August 18, 1890, 26 Stat. 316, as amended, 50 U. S. C. 171	32
Act of May 25, 1926, 44 Stat. 630, 40 U. S. C. 341	32
Act of March 1, 1929, 45 Stat. 1415, as amended, 40 U. S. C. 361	33
Bankruptcy Act, Ch. X, 52 Stat. 828, 11 U. S. C. 501, <i>et seq.</i>	2, 14
First War Powers Act, 1941, c. 593, Section 301, 55 Stat. 838, 50 U. S. C. App. (Supp. V) 5 (b)	12
Joint Resolution of May 7, 1940, 54 Stat. 179	29
Judicial Code, Section 153, 28 U. S. C. 259	27
Judicial Code, Section 155, 28 U. S. C. 261	27
Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U. S. C. App. 1 <i>et seq.</i>	
Section 2	7, 34
Section 5 (b)	6, 7, 8, 10, 11, 12, 19, 23, 24, 25, 29, 32, 35
Section 7 (c)	7, 8, 10, 11, 36
Section 7 (e)	6, 20, 23
Section 8 (a)	5, 6, 12, 13, 16, 25, 38
Section 9 (a)	9, 20, 23, 39
Section 17	22
Section 32	15
Convention for the Protection of Industrial Property of June 2, 1934, 53 Stat. 1768, 1772	26
Treaty of Friendship, Commerce, and Extradition between the United States and Switzerland, November 25, 1850, 11 Stat. 587	26, 27
Executive Order No. 2813, February 26, 1918	10
Executive Order No. 8389, April 10, 1940, 5 F. R. 1400	29
Executive Order No. 8785, June 14, 1941, 6 F. R. 2897	7, 29
Executive Order No. 9193, July 6, 1942, 7 F. R. 5205	8, 29
Executive Order No. 9788, October 14, 1946, 11 F. R. 11981	3
Vesting Order No. 360, F. R. 33	3
Miscellaneous:	
H., Rep. No. 1507, 77th Cong., 1st Sess.	31
Revised Rules of the Supreme Court of the United States:	
Rule 27	18
Rule 38	18
Richardson, <i>History, Jurisdiction, and Practice of the Court of Claims</i> , 17 C. Cls. 17	27
S. Rep. No. 911, 77th Cong., 1st Sess.	31

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OPINIONS BELOW.

The opinion of the District Court (R. 49) is not reported. The opinion of the Circuit Court of Appeals (R. 63-69) is reported at 156 F. 2d 793.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 69) was entered on July 3, 1946. The petition for writ of certiorari was filed on August 2, 1946. The petition was denied on October 14, 1946 but the order denying the petition was va-

cated and the petition granted on February 17, 1941 (R. 70). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Acting pursuant to the Trading With the Enemy Act, as amended by the First War Powers Act, 1941, the Alien Property Custodian has vested certain shares of stock in an American corporation and has directed that corporation to issue to him new certificates representing the vested shares. The corporation asserts that certain Swiss banks, which participated in the proceedings before the district court but have not appealed, are in fact pledgees of the shares. The question presented is whether on this record these petitioners may dispute the Custodian's demand for immediate possession of the property.

STATUTE INVOLVED

The relevant provisions of the Trading With the Enemy Act, 40 Stat. 411, 50 U. S. C. App. 1 *et seq.*, as amended by the First War Powers Act, 1941, 55 Stat. 838, 50 U. S. C. App. (Supp. V) 5 (b) are set forth in an Appendix, *infra*, pp. 34-40.

STATEMENT

Petitioner Silesian American corporation is the debtor in proceedings for corporate reorganization brought in the district court on July 29, 1941, pursuant to Chapter X of the Bankruptcy Act,

11 U. S. C. 501 *et seq.* (R. 1, 34). Petitioner Silesian Holding Company is the holder of the majority of the outstanding shares of the debtor's common and preferred stock (R. 5).

On November 17, 1942, the Alien Property Custodian, the predecessor of the respondent,¹ issued Vesting Order No. 370, 8 F. R. 33 (R. 14-15). By that Order he vested in himself 50,000 shares (41.67%) of the preferred stock of the debtor and 98,000 shares (49%) of its common stock. The Order contains findings that the shares in question were "owned by Non Ferrum-Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, and held for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben, a German corporation"; that the shares are property of a "national of a designated enemy country (Germany)"; and that it is necessary in the national interest to vest them. A copy of this Order was served on the debtor (R. 16), and the debtor was directed to cancel on its books the

¹By Executive Order No. 9788, October 14, 1946, 11 F. R. 11981, the authority, rights, privileges, and powers of the Alien Property Custodian and of the Office of Alien Property Custodian were transferred to the Attorney General. By order of this Court dated February 17, 1947, Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, was substituted as respondent for James E. Markham, as Alien Property Custodian. In this brief we shall use the term "Custodian" interchangeably to refer to the former Alien Property Custodian and to the Attorney General, as successor to the Alien Property Custodian.

outstanding certificates representing the vested shares and to issue new certificates to the Custodian (R. 16-17).

The debtor thereupon filed a petition in the bankruptcy proceeding for instructions whether to comply with this direction (R. 5-13). The petition for instructions, among other things, alleged on information and belief that certificates representing the vested shares were held by four named banks in Switzerland, herein referred to as the "Swiss banks," as collateral security for certain loans (R. 7) and requested instructions whether upon compliance with the Custodian's demand for the issuance to him of new certificates the debtor "would be protected from any and all claims by any parties, including said Swiss Banks" (R. 12). The district court, after hearing argument on the return to a show cause order issued on this petition (R. 3), held that the Trading With the Enemy Act "protects the debtor corporation and relieves it of doubt in the premises" and declined to consider whether the Swiss banks owned any interest in the vested shares (R. 49). It accordingly entered an order directing the debtor to cancel the outstanding certificates and to issue new certificates as directed by the Custodian (R. 50-51). Although the Swiss banks appeared by counsel in the district court in response to the order to show cause (R. 2, 50), they did not appeal from its decision (R. 64). The present

petitioners appealed, and the Circuit Court of Appeals, in an opinion by Judge Learned Hand, affirmed the District Court's order (R. 69).

SUMMARY OF ARGUMENT

This proceeding involves only the right of the Alien Property Custodian to immediate possession of property which he has vested pursuant to the Trading With the Enemy Act. In such proceedings it has been consistently held that, in the absence of special statutory rights, the Custodian's right to immediate possession may not be disputed. All questions as to his ultimate right to the property and as to the obligation, if any, of the United States to pay compensation for it may be litigated in other proceedings after the property has come into the Custodian's possession.

Petitioners urge that by reason of Section 8 (a) of the Act certain alleged pledgees, who were parties to the proceedings in district court but did not appeal, have rights to possession of the pledged property superior to the right of the Custodian. We think that such rights, if any, are personal to the pledgees and they may, as they evidently have done here, elect to abandon assertion of those rights at this time and resort to other remedies available under the Act. It follows that petitioners may not assert those rights on behalf of the pledgees.

Moreover, the record in this case does not reveal any basis for asserting rights under Section 8 (a).

There is no allegation or proof that the alleged pledge was one which included the power to dispose of the property on "notice or presentation or demand"—the only type of pledge covered by Section 8 (a). Indeed, as the district court ruled, there is no evidence of any probative value that the property in question is pledged property.

In any event, petitioners will be subject to no liability to the alleged pledgees if they comply with the Custodian's demand. By failing to appeal from the judgment below, the alleged pledgees are barred from suit against the petitioners both on principles of estoppel and *res judicata*. In any event, the exculpatory provisions in Section 5 (b) (2) and 7 (e) afford complete protection to petitioners.

Petitioners are without standing in this proceeding to urge the constitutional objections to the statute which they advance and, in any event, these objections are without substance.

ARGUMENT

Reciting that he was acting "Under the authority of the Trading with the enemy Act, as amended, and pursuant to law", the Alien Property Custodian vested certain shares in the debtor corporation. He found that the shares were held by a Swiss corporation for the benefit of a German corporation, and that they were property of "a national of a designated enemy country (Germany)" (R. 14). Inasmuch as the order states that the shares were property of a "na-

tional" of Germany, the vesting was an appropriate exercise of the power conferred by Section 5 (b) of the Act to vest "any property or interest of any foreign country or national thereof".² In addition, the order was an equally appropriate exercise of the power conferred by Section 7 (c) of the Act to vest any property belonging to, or held for the benefit of, "an enemy or ally of enemy".³

Subsequently, the Custodian directed the debtor to cancel the outstanding certificates for the stock in question and issue new certificates to him (R. 16). This litigation arises out of the debtor's efforts to avoid complying with the Custodian's demand. The sole question is whether there is any legal justification for the debtor's refusal to comply with such a demand based upon a vesting order which is valid on its face.

Petitioners present to this Court no question as to the authority of the Custodian to make such a demand for certificates as an "incident" of a valid vesting order (*cf. Stoehr v. Wallace*, 255

² In Section 3 of Executive Order No. 8785, June 14, 1941, 6 F. R. 2897, Germany is designated as a "foreign country" for purposes of Section 5 (b). See also Section 10 of Executive Order No. 9193, July 6, 1942, 7 F. R. 5205.

³ Section 2 (a) of the Act defines the term "enemy" as including "any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

U. S. 239, 246).⁴ Nor do they raise any issue as to the validity and effect of the Vesting Order in so far as it affects either of the foreign corporations named in it (*cf.* Brief for Petitioners, pp. 2-3).⁵ Petitioners' entire case is based upon asserted rights accruing under Section 8 (a) of the Act to the Swiss banks as alleged pledges of the stock in question. To prevail, petitioners must establish (1) that petitioners, who do not claim

⁴ The holding of the Circuit Court of Appeals that that authority must be implied from the powers to vest and sell shares of stock (R. 68) is supported by the express grants in Section 5 (b) of the Act of authority to "perform any and all acts incident to the accomplishment or furtherance of" the purposes of the Section, and to "take other and further measures not inconsistent herewith for the enforcement of this subdivision"; by the further grant in subparagraph (B) of Section 5 (b) (1) of power to "direct and compel" any "transfer" and to "nullify" and "void" any holding of property in which a foreign national has an interest; and by the absence of any suggestion in the legislative history of the First War Powers Act, 1941, of any intention to deny to the Executive an authority which has been repeatedly exercised during World War I. In addition, Section 7 (c) of the Act expressly makes it the duty of a corporation, any shares of which have been vested by the Alien Property Custodian, to cancel the outstanding certificates for such shares and issue new certificates to the Custodian. *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182; *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (C. C. A. 5); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746 (C. C. A. 2); *Garvan v. Marconi Wireless Telegraph Co. of America*, 275 Fed. 486 (D. N. J.); *Hicks v. Baltimore & Ohio R. Co.*, 10 F. 2d 606 (D. Md.). We have found no contrary decision on the question.

⁵ Plainly, any such attack on the Vesting Order would be without substance; see *infra*, pp. 25-26.

that the asserted rights accrued to them, have standing in the courts to seek an adjudication of those rights, and (2) that upon the record in this case there is a sufficient showing to justify holding that any rights found to exist under Section 8 (a) have been violated. For the reasons set forth below we think petitioners fail in every respect to sustain the burden.

I

PETITIONERS MUST YIELD TO THE CUSTODIAN'S DEMAND FOR THE PROPERTY UNLESS THE STATUTE SPECIFICALLY AUTHORIZES THEM TO REFUSE

Since the decision of this court in *Central Union Trust Co. v. Garvan*, 254 U. S. 554, it has been settled that the Custodian may, pursuant to the Trading with the Enemy Act, forcibly seize property under Section 7 (c), and that a resort to the courts in aid of his seizure was to be no "less immediately effective than a taking with the strong hand" (*id.*, 568). See *Stoeck v. Wallace*, 255 U. S. 239; *Commercial Trust Co. v. Miller*, 262 U. S. 51. As this Court said in *Central Union Trust Co. v. Garvan*, *supra*, 567, "obedience to the statute requires an immediate transfer in any case within its terms without awaiting a resort to the Courts." Section 9 (a) of the Act affords a judicial trial *de novo* of the question whether the property was within the granted seizure power and that section has been held to afford the only procedure in which any issues as to the Custo-

(dian's ultimate right to the property may be litigated. See as to suits by the Custodian to compel the conveyance of property demanded by him, *Central Union Trust Co. v. Garvan*, *supra*; *Commercial Trust Co. v. Miller*, *supra*; as to suits to enjoin compliance with the Custodian's demand, *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852 (S. D. N. Y.); as to proceedings by way of a bill of interpleader or bill of accounting, *American Exchange National Bank v. Garvan*, 273 Fed. 43 (C. C. A. 2); *Kahn v. Garvan*, 263 Fed. 909 (S. D. N. Y.).

Section 5 (b), as amended, plainly calls for an initial transfer to the Custodian no less peremptory in character. Its provision that property "shall vest, when, as, and upon the terms directed by the President" contemplates a transfer of title by executive declaration,* and there is nothing to suggest that the Custodian's demand for possession of property so vested was intended to be less immediate and compelling in this war than in the last. In cases involving property vested pursuant

* The terminology of vesting was used during World War I to describe the passage of title under Section 7 (c). Thus Section 2 (c) of Executive Order No. 2813, February 26, 1918, provided in part that "When demand shall be made and notice thereof given * * * such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded * * *".

to Section 5 (b) the courts have consistently held that the issuance of a vesting order vests title in the Custodian (*United States v. The Antoinetta*, 153 F. 2d 138, 143 (C. C. A. 3), certiorari denied, 328 U. S. 863; *Sarazin v. Wright Aeronautical Corp.*, 54 F. Supp. 244, 252 (S. D. N. Y.)) and with without delay and without dispute as to his ultimate right to retain the property (*Application of Alien Property Custodian*, 60 N. Y. S. 2d 897 (App. Div., 4th Dept.); *Stern v. Newton*, 180 Misc. 241, 39 N. Y. S. 2d 593 (Sup. Ct. N. Y.); *In re Yokohama Specie Bank*, 66 N. Y. S. 2d 289 (Sup. Ct.)). As we point out in our brief in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 33-63, a transfer accomplished thus summarily does not determine the ultimate rights of the owners; those rights are secured by the provision for the return of property which is judicially found not to be within the range of the Custodian's vesting authority and by the availability of the right to sue for just compensation if the property is within the range of that authority but the owner is entitled to the protection of the Fifth Amendment. Whether the vesting order here involved be regarded as an exercise of authority conferred by Section 5 (b) or Section 7 (c), or both, petitioners cannot prevail unless they can establish that they are by statute entitled to special consideration.

REGARDLESS OF WHAT RIGHTS A PLEDGEE MAY HAVE,
PETITIONERS HAVE NO STANDING TO RESIST THE
CUSTODIAN'S DEMAND

A. ASSUMING THAT SECTION 8 (a) GIVES THE ALLEGED PLEDGEE
RIGHTS WHICH MAY BE ASSERTED HERE, THOSE RIGHTS ARE
PERSONAL AND MAY NOT BE ASSERTED BY PETITIONERS

Petitioners assert that Section 8 (a) creates an exception to the statutory scheme just summarized by permitting one who asserts that he is a pledgee of property vested by the Custodian to secure at the outset a judicial determination of the existence of the asserted pledge. We think it unnecessary to consider whether Section 8 (a) has that effect in the case of a pledgee who is not a national of a foreign country. We think the court below rightly held (R. 67-68) that in view of the amendments made to Section 5 (b), as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 5 U. S. C. App., Supp. V, 5 (b), nationals of a foreign country, which the alleged pledgees in this case concededly are, cannot assert whatever rights are conferred by Section 8 (a). As we point out in our brief in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 9-33, Section 5 (b) now authorizes the Custodian to vest, retain and use any interest of any foreign national in any property. Since Section 5 (b) is the later enactment, Section 8 (a) was properly construed by the court below as no longer interposing any

barrier to seizure and retention of possession by the Custodian of pledged property in the hands of a foreign national. If the court below was correct in so ruling, and we submit that it was, the entire foundation upon which the petitioners' argument rests is destroyed.

But even on the assumption that the Swiss banks, if they were before this Court, might be heard to resist the Custodian's demand for the issuance of new certificates, we submit that these petitioners have no standing to do so. Section 8 (a) is cast in terms of a personal privilege conferred upon a pledgee to hold possession of the pledged property until the pledge is satisfied. Only the pledgee is entitled by its terms to "continue to hold" the property, and the grant of the privilege thus to hold presupposes that the holder "may dispose of the property" in satisfaction of the pledge and will account to the Custodian for any surplus received. Plainly the Section confers no privilege which may be asserted by one who is not a pledgee and has no power of disposition over the pledged property.

The privilege conferred by Section 8 (a) is not being claimed here by the pledgees. While the Swiss banks, the asserted pledgees, appeared by counsel in the district court (R. 2, 50) and asked that the issuance of certificates to the Custodian be deferred until they could have opportunity to prove the existence of their asserted pledge (R.

23), they did not join in the appeal to the Circuit Court and are not before this Court.' Petitioners assert no interest in the stock by way of pledge or otherwise. Nor do they purport in any way to represent the Swiss banks. Rather, their position in the district court was antagonistic to that of the Swiss banks. The debtor there requested instructions whether upon compliance with the Custodian's demands "the Debtor would be protected from any and all claims by any parties, including said Swiss Banks" (R. 12), and the accompanying affidavit refers to a letter from counsel for those banks which threatened to hold the debtor liable for any damage suffered by them as a result of the debtor's compliance with the order (R. 31-33).*

*As alleged holders of a beneficial interest in the stock, they were persons entitled to be heard within Section 906 of the Bankruptcy Act, 52 Stat. 894, 11 U. S. C. 606, and hence they would appear to have had standing to appeal if they presented any issue of which the courts would have cognizance. Cf. *Young v. Higbee Co.*, 324 U. S. 204, 210; *Dana v. Securities & Exchange Commission*, 125 F. 2d 542 (C. C. A. 2).

*To the extent that the judgment of the District Court was simply one granting instructions, there may be some question whether it could properly be appealed from by the petitioners, for the debtor had been granted the relief requested—the issuance of instructions which would remove its doubts—and it presumably had no legitimate interest in the nature of those instructions. The proceedings in the Circuit Court of Appeals and in this Court would to that extent appear to be nonadversary in character. Cf. *Burco, Inc. v. Whitworth*, 81 F. 2d 721, 728 (C. C. A. 4), certiorari denied, 297 U. S. 724. We have assumed, however, that because the order of the District Court directed

Furthermore, petitioners are seeking to assert alleged rights on behalf of the Swiss banks which the banks have evidently chosen to abandon. The fact that the banks chose not to appeal in this proceeding is a plain indication that they were willing to allow the Custodian to take possession of the stock and rely upon other means for protecting their interests. Certainly such an election does not deprive them of adequate remedies. Under Section 32 of the Act they may seek the return of the stock in an administrative proceeding. In addition, as we point out in our brief in *Clark v. Uebersee Finanz-Korporation*, No. 934, this Term, pp. 33-63, judicial remedies are fully available in which they can litigate any questions as to the Custodian's ultimate right to retain the property and can secure full protection of any constitutional rights.*

We submit that petitioners have no standing to assert alleged rights in which they have no interest, which could accrue only to parties not

certain action by the debtor—the issuance of new stock certificates—it had standing to appeal from that order. *In re Barnett*, 124 F. 2d 1005, 1008 (C. C. A. 2); see *id.* 1013 (dissenting opinion); *Fishgold v. Sullivan Drydock Corp.*, 328 U. S. 275. The issues presented by the debtor's appeal are the same as those which could have been presented upon an application by the Custodian to enforce his demand for new certificates, see cases cited *infra*, p. 20.

* Cf. *Mayer v. Garvan*, 278 Fed. 27 (C. C. A. 1), *Standard Oil Co. v. Markham*, 64 F. Supp. 656, 665, 671 (S. D. N. Y.); *Kind v. Clark* (C. C. A. 2), decided April 9, 1947, not yet reported.

before this Court, and which the real parties in interest have elected to abandon.

B. NEITHER THE PLEADINGS NOR THE EVIDENCE IN THIS CASE ESTABLISH THAT ANYONE IS ENTITLED TO CLAIM THE RIGHTS WHICH PETITIONERS ENDEAVOR TO ASSERT

The sole issue which petitioners attempt to present to this Court is whether the Swiss banks have certain rights stemming from Section 8 (a) of the Act. That Section is applicable solely to persons holding property, under a "mortgage, pledge, or lien, or right," which "may be disposed of on notice or presentation or demand." In order to assert rights under Section 8 (a) it is essential to establish that the pledge is one which permits the pledged property to be "disposed of on notice or presentation or demand." *Garvan v. \$50,000 Bonds*, unreported (S. D. N. Y.),¹⁰ affirmed, 265 Fed. 477 (C. C. A. 2), affirmed *sub nom. Central Union Trust Co. v. Garvan*, 254 U. S. 554. Neither in the petition for the order to show cause, nor in what may be considered the return to the order filed on behalf of the Swiss banks, nor in any other pleading, is there any suggestion that the alleged pledge here involved is such that the pledged property "may be disposed of on notice or presentation or demand." Likewise, the record is barren of any evidence to that effect.

¹⁰ The opinion may be found in the record in No. 394, October Term 1920, at pages 79-84.

Moreover, there is no evidence in the record to establish the existence of any pledge. There are four affidavits in the record which aver that certain unidentified shares of the debtor's stock were at various times pledged to the Swiss Banks as security for loans, but there is nothing to show that the asserted pledges are still in existence or to indicate who has possession or right to possession of the shares (R. 44-48). The district court rightly regarded the affidavits as being of no probative value (R. 49). It is true that the Swiss banks, after having delayed the Custodian's acquisition of possession for more than two years while they allegedly endeavored to collect evidence,¹¹ sought more time for that purpose (R. 17-23). The record discloses no objection to the court's action in refusing to grant the request and in proceeding with the hearing. The Swiss banks participated in the hearing (R. 50) and neither assigned error to the judgment nor appealed therefrom. In the circumstances, the record can hardly be said to afford a basis for the contentions which petitioners advance.

Petitioners argue (Brief for Petitioners, pp. 64-66) that it was error for the district court not to postpone decision in order to give the Swiss

¹¹ The Vesting Order was issued November 17, 1942 (R. 14). The order to show cause was dated April 5, 1943 (R. 4). The order here appealed from was dated October 30, 1945 (R. 51).

banks an opportunity to prove the existence of their pledges. That question was not presented by the petition for writ of certiorari (see Petition, pp. 5-13) and has never been specified as error (see Petition, pp. 16-19; Brief for Petitioners, pp. 7-9). For that reason alone the contention cannot be considered here. Rule 38, par. 2; Rule 27, par. 6; *General Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 179; *National Licorice Co. v. Labor Board*, 309 U. S. 350, 357; *Flournoy v. Wiener*, 321 U. S. 253, 259. Moreover, it is a contention which these petitioners plainly could not assert, for there is no suggestion in the record that they ever requested an opportunity to prove the existence of the pledge—a matter in which they presumably had no interest.

C. PETITIONERS' FEARS THAT THE DEBTOR MAY BE HELD LIABLE TO THE SWISS BANKS FOR OBEYING THE DIRECTIONS OF THE CUSTODIAN ARE GROUNDLESS

Petitioners assert (Brief for Petitioners, pp. 57-64) that they may be subjected to liability to the Swiss banks should they comply with the Custodian's demand for the issuance of new certificates. We think their fears are groundless.

In the first place, the petitioners, in complying with the Custodian's demand, will be acting under the instruction of a court of competent jurisdiction. Cf. *City Bank Farmers Trust Co. v. Smith*, 263 N. Y. 292, 295-6, 189 N. E. 222, 223-4. It

is unnecessary to consider how far that instruction would protect them from liability to one who had no opportunity to object to the giving of the instruction for here the Swiss banks were represented by counsel in the district court. As pointed out above, they did not file objection or assign error to the judgment of the district court and did not attempt to appeal. Any effort on their part to hold the debtor liable for compliance with the district court's order, from which they made no attempt to appeal, would appear to be barred by principles of both estoppel and *res judicata*. Cf. *United States v. Guaranty Trust Co. of New York*, 76 F. 2d 747 (C. C. A. 2).

Moreover, in seeking instructions from the District Court, petitioners displayed an excess of caution. The Trading With the Enemy Act itself specifically forecloses any possibility that they might be held liable to the Swiss banks or to any other owner of an interest in the shares as a result of their compliance with the Custodian's demand. Section 5 (b) (2) of that Act provides that "any payment, conveyance, transfer, assignment, or delivery" to the Custodian of any property or interest "shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same," and that "no person shall be held liable in any court for or in respect to anything done or omitted in good faith" in pursuance of any order, rule, or

regulation issued pursuant to the Act." Like the similar provisions of Section 7 (e) of the Act, these provisions were intended to provide "in the most explicit way for the complete protection in every court of the bailee, trustee, agent, obligor, or other person called upon to yield to the Alien Property Custodian's symbolic act of capture." *Kahn v. Garvan*, 263 Fed. 909, 914 (S. D. N. Y.). See also *Farmers' Loan & Trust Co. v. Hicks*, 9 F. 2d 848, 851 (C. C. A. 2); *Wageck v. Travelers Insurance Co.*, 108 Misc. 65, 177 N. Y. S. 327 (Sup. Ct.). They plainly relieve a corporation from any possibility that it might be held liable to the holder of outstanding stock certificates by reason of the issuance to the Custodian of new certificates representing shares vested by him. *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182; *Columbia Brewing Co. v. Müller*, 281 Fed. 289 (C. C. A. 5); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746 (C. C. A. 2); *In re Sutherland*, 23 F. 2d 595, 598 (C. C. A. 2); *Garvan v. Marconi Wireless Telegraph Co.*, 275 Fed. 486 (D. N. J.); *Hicks v. Baltimore & O. R. Co.*, 10 F. 2d 606 (D. Md.).

¹² These exculpatory provisions of Section 5 (b) (2) are plainly not open to attack as creating a conclusive presumption or as invading the judicial function, as the petitioners suggest (Brief for Petitioners, pp. 61-63). They do not foreclose judicial inquiry into any issue; they merely restrict that inquiry to an appropriate proceeding under Section 9 (a) or the Tucker Act.

In reality petitioners are attempting, by the assertion of fears which Sections 5 (b) (2) and 7 (e) were intended to dispel, to secure at the outset an adjudication of the respective rights of the Custodian and the Swiss banks in the shares. This attempt deserves to meet with no more success than did the similar attempt in *American Exchange National Bank v. Garvan*, 273 Fed. 43 (C. C. A. 2). There the Custodian had demanded that the bank pay over to him a deposit which he determined to be owing to an enemy. The bank, asserting that the depositor threatened to hold it liable should it comply with the Custodian's demand, sought by bill of interpleader to secure a determination of the ultimate rights of the depositor and the Custodian. The Circuit Court of Appeals for the Second Circuit directed that the bill be dismissed, holding that the Custodian's right to immediate possession could not thus be delayed and that the bank was fully protected by the provisions of Section 7 (e).

Petitioners suggest, however, that if the grant of authority to vest the property of foreign nationals conferred by Section 5 (b) (1) is unconstitutional, the exculpatory clause of Section 5 (b) (2) will afford them no protection (Brief for Petitioners, pp. 63-4). In Part III of this brief, we shall point out the insubstantiality of the constitutional objections to Section 5 (b) which they suggest. But it is now well established that the

presentation of constitutional issues, like other issues, can validly be restricted to an exclusive procedure. *Tyler v. Judges of Court of Registration*, 179 U. S. 405; *Adams v. Milwaukee*, 228 U. S. 572; *Myers v. Bethlehem Shipbuilding Corp.*; 303 U. S. 41; *Yakus v. United States*, 321 U. S. 414, 434, and cases cited. We think that is what has been done in the Trading With the Enemy Act. Nothing in the decisions which hold that property demanded by the Custodian must be immediately transferred to him without awaiting the delays of litigation suggests any exception for cases where constitutional objection to the validity of the seizure were raised.¹³ Indeed the existence of such an exception is expressly denied by *Commercial Trust Co. v. Miller*, *supra*. There a trustee of property held for the joint account of a neutral and an enemy declined to comply with the Custodian's demand that the entire trust res be conveyed to the Custodian. In defense to a suit by the Custodian under Section 17 of the Act to compel the transfer of the trust *res* to him, the

¹³ The procedure under the Trading With the Enemy Act for a summary taking followed by subsequent adjudication of its validity has often been analogized to the power to collect taxes by distraint (*Phillips v. Commissioner*, 283 U. S. 589, 597; *Yakus v. United States*, 321 U. S. 414, 442; *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852, 860-61 (S. D. N. Y.)), a power whose exercise cannot be restrained by attack on the constitutionality of the tax (*Snyder v. Marks*, 109 U. S. 189; *Dodge v. Osborn*, 240 U. S. 118).

trustee contended, among other things, that the Act was unconstitutional as to the neutral as a taking of property without due process of law and that the exculpatory provisions of Section 7 (e) would afford no defense to the trustee should it comply with the Custodian's demand. The court refused to consider this contention, pointing out that "the suit was tantamount to physical seizure" (p. 55), and stating that "It is manifest, therefore, that the defenses upon which the contentions are based were not available to either claimant of the property" (p. 56). See also *United States Trust Co. v. Miller*, 262 U. S. 58; *Ahrenfeldt v. Miller*, 262 U. S. 60.

It does not follow that the Swiss Banks are left without a remedy. As we pointed out *supra*, p. 15, they are entitled to be heard in an administrative proceeding before the Custodian and may also bring suit in the courts against the United States for compensation (see Government's Brief in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*). Moreover if Section 5 (b) should be held unconstitutional, Section 9 (a) would clearly afford full relief from a constitutionally unauthorized vesting, for the bar which we believe Section 5 (b) now interposes to recovery by a foreign national under Section 9 (a) would be removed. Those remedies would be fully adequate to protect all constitutional rights of former owners of vested property. Cf. *Central Union Trust Co. v. Garvan*,

254 U. S. 554; *Stoehr v. Wallace*, 255 U. S. 239; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Becker Steel Co. v. Cummings*, 296 U. S. 74.

Since any owner of an interest in the vested shares would thus have a fully adequate remedy to redress a constitutionally unauthorized seizure without the necessity of suit against the debtor, there is plainly no basis for denying effect to the exculpatory clause of Section 5 (b), or for permitting the immediate reduction to possession of the vested shares to be delayed by litigation as to constitutional issues which can be fully presented in a subsequent proceeding.

III

THE PETITIONERS' OBJECTIONS TO THE CONSTITUTIONALITY OF SECTION 5 (b) ARE WITHOUT SUBSTANCE

In their brief, petitioners argue at length the proposition that Section 5 (b) of the Trading With the Enemy Act must be read as conferring the power to vest and retain only the property of enemies and not the property of nationals of a foreign country (Brief for Petitioners, pp. 17-54). This construction of Section 5 (b) they seek to support by reference to the legislative history of that Act and subsequent bills and by argument that if construed otherwise Section 5 (b) would be unconstitutional.

We think there are a number of reasons why this argument need not be considered by this Court. The argument is apparently addressed

only to the question whether, as a result of the amendment of Section 5 (b) in 1941, a foreign national may now claim any rights under Section 8 (a) to resist the transfer to the Custodian of property vested by him. As we have shown in Part IIA, *supra*, petitioners have no conceivable interest in that question. If the argument is addressed also to the validity of the Vesting Order in so far as it is based upon the power to vest the property of any foreign national, petitioners are in no better position for, as we have pointed out in Part IIC, *supra*, such questions as to the scope and validity of the vesting power can be considered only in a proceeding under Section 9 (a) and not in resistance to the Custodian's summary demand for possession. The possibility of liability to the Swiss Banks or other claimants of the stock, which alone gives the petitioners any interest in the questions sought to be raised, is expressly foreclosed by Sections 5 (b) (2) and 7 (e). Moreover, even on petitioners' theory that Section 5 (b) (1) should be judicially rewritten to substitute the words "enemy or ally of enemy foreign country" for the words "foreign country" in the grant of the vesting power and that the purpose of Congress was merely "to revive the 1917 statute" (Brief for Petitioners, pp. 27-32), the Custodian's Vesting Order could not be attacked, for, as we have pointed out above, p. 7, *supra*, that Order goes no further than he could have

gone under the Act as it stood during World War I.

In any event, the petitioners' contentions are without substance. The legislative materials on which they rely (Brief for Petitioners, pp. 22-39) are fully discussed in our brief in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 18-28, 48-54, as are their suggestions (Brief for Petitioners, pp. 39-40, 42-43) with respect to repeals by implications of other provisions of the Trading With the Enemy Act, and of the Treaty of 1850 with Switzerland (Brief for the Custodian in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 33-39, 63-68.)" The petitioners' suggestion (Brief for Petitioners, pp. 44-48) that the Act, if construed to deny to foreign nationals the right of recovery under

"Petitioners refer also to Article 2 of the Convention for the Protection of Industrial Property of June 2, 1934, 53 Stat. 1768, 1772. Since the "protection of industrial property" to which the convention relates is defined in Article 1 (2) of the convention as including "patents, utility models, industrial designs and models, trade marks, commercial names and indications of origin, or appellations of origin, as well as the repression of unfair competition," it is difficult to see what relevance the Convention can have to the power of the Custodian to vest and retain shares of stock. In any event, the guarantee in Article 2 (1) of the "same legal remedy against any infringement of their rights," read in context, plainly refers to the rights to sue for patent and trade mark infringement and the like, and does not preclude the exercise of the ordinary right of the United States to take property, upon payment of just compensation. See also the reservations of Article 2 (3) of the Convention.

Section 9 (a), would leave non-enemy foreign nationals without remedy has also been fully discussed in our brief in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 54-63. We there point out that any and all constitutional rights of such a non-enemy foreign-national are fully protected by the availability of a suit for just compensation under the Tucker Act.¹⁵

¹⁵ The petitioners suggest two obstacles to the availability of such a suit which were not discussed in our Brief in the *Uebersee* case. One is the provision of Section 153 of the Judicial Code, 28 U. S. C. 259, that the jurisdiction of the Court of Claims "shall not extend to any claim * * * growing out of or dependent on any treaty stipulation entered into with foreign nations * * *." To the extent that any suit of the Swiss banks for just compensation is founded upon a claim of constitutional right to compensation or upon an implied promise to pay such compensation as the Constitution might require, it plainly would not be a claim growing out of or dependent on a treaty stipulation. Indeed, the Swiss banks, being corporations, could not in any event assert any rights under the Treaty of 1850 with Switzerland to which the petitioners refer. See Brief for the Custodian in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 63-68.

The petitioners also refer to the provision of Section 155 of the Judicial Code, 28 U. S. C. 261, that aliens may sue in the Court of Claims only if they are citizens or subjects of a government which accords to citizens of the United States the right to prosecute claims against it. Whatever application that provision might have in other contexts, cf. *Russian Volunteer Fleet v. United States*, 292 U. S. 481, it could not operate to bar any claim of the Swiss banks, for the Court of Claims has twice held that Switzerland satisfied the requirements of that Section and that a Swiss may accordingly bring suit in the Court of Claims. *Lobsiger v. United States*, 5 C. Cls. 687; *Hartmann v. United States*, 86 C. Cls. 579; see Richardson, *History, Jurisdiction, and Practice of the Court of Claims*, 17 C. Cls. 17.

The petitioners further suggest (Brief for Petitioners, pp. 49-50) that Section 5 (b) is unconstitutional because it fails to require an investigation and formal findings prior to the issuance of a vesting order." Since the Vesting Order in suit (R. 14-15) contains explicit findings which are recited to have been made "after investigation," it cannot be asserted that the omission of the Act to require such investigations and findings was prejudicial in this case. But in any event, the omission of those requirements cannot violate any constitutional right, for any claimant to the property may secure, in a suit under Section 9 (a), a judicial trial *de novo* "unembarrassed by the precedent executive determination" (*Stoehr v. Wallace*, 255 U. S. 239, 246; *Commercial Trust Co. v. Miller*, 262 U. S. 51, 53) of all questions relating to the Custodian's authority to vest and retain the property. Plainly the right to such a trial satisfies the most stringent requirements of procedural due process.

The petitioners suggest also (Brief for Petitioners, pp. 50-54) that Title III of the First War Powers Act makes an improper delegation of legislative authority to the Executive." This conten-

¹⁰ *Hunter v. Central Union Trust Co.*, 17 F. 2d 174 (S. D. N. Y.), referred to by the petitioners in this connection, holds no more than that a demand, which fails to identify the specific property demanded is ineffective.

¹¹ As the court below properly pointed out, no objection can be made on the ground of indefiniteness (*cf. United*

tion is also without substance. In Section 5 (b) Congress has stated explicitly both the powers conferred and the subject matter—property of a foreign country or a national thereof¹⁸—to which they may be applied, and has limited the occasion of their exercise to “time of war or during any other period of national emergency.”¹⁹ Moreover, the Executive was not left without guidance as to the policies which were to govern the exercise of the vesting power within the areas thus delimited. Those policies were suggested by the direction that vested property be held and used, etc., “in the interest of and for the benefit of the United States,” by the evident purposes of the Act as disclosed by its

States v. Cohen Grocery Co., 255 U. S. 81), for, as the court said, “all seizures are made by orders *ad hoc*, and the duties imposed are clear and explicit” (R. 66).

¹⁸ These terms are defined in detail by the applicable executive orders. (See Section 5 of Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897, made applicable to the exercise by the Custodian of the vesting power by Section 10 of Executive Order No. 9193, July 6, 1942, 7 F. R. 5205.) The definitions in their original form were expressly ratified by the Joint Resolution of May 7, 1940, 54 Stat. 179. The amended definitions presently in effect were in force when the First War Powers Act was passed. Moreover, the President's power to prescribe definitions is limited by the requirement of Section 5 (b) (3) that the definitions be “not inconsistent with the purposes of this subdivision.”

¹⁹ Since the vesting power has thus far been exercised only during time of war, it is unnecessary to consider the questions that might be presented by an exercise of that power at a time when the United States was not at war.

text and by the reports of the committees of Congress (see Brief for the Custodian in No. 934, *Clark v. Uebersee Finanz-Korporation, A. G.*, pp. 9-21), and by the historical background of both the seizure of enemy property during World War I and the freezing of foreign property preceding our entry into World War II in which the new powers were placed.

Viewing the circumstances realistically (*cf. Bowles v. Willingham*, 321 U. S. 503, 515), Congress could not have been expected to impose standards of greater precision. In the delicate and constantly shifting field of foreign relations, Congress could not undertake the responsibility of designating the foreign countries with respect to the property of whose nationals each of the various powers granted by Section 5 (b) should be exercised, nor of revising that designation with the promptness that occasion might demand. Nor could it practicably attempt either to lay down a binding definition of "national" which could be expected with assurance to pierce all the myriad cloaking devices whose discovery could be anticipated, or to prescribe in an informed manner fixed categories of property to which the vesting and freezing powers, respectively, were to be applied. And even if it could have done so, it was not required to do so. This Court has pointed out that it is for Congress to choose between rigidity and flexibility in the administration of its

laws. *Yakus v. United States*, 321 U. S. 414, 425-6. Here the reports of the committees of Congress have emphasized the importance which Congress attached to the avoidance of "rigidity and inflexibility" by the grant of "flexible powers * * * to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case." H. Rep. No. 1507, 77th Cong., 1st Sess., p. 3; see S. Rep. No. 911, 77th Cong., 1st Sess., p. 2. This Court cannot be asked to substitute its judgment for that of Congress as to the wisdom of this choice.

Tested by established principles, Section 5 (b) plainly does not involve any abdication by Congress of its legislative functions. In dealing with the field of foreign relations in time of war, Congress was not required to state with rigid precision the policies which were to govern the exercise of the powers conferred. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304. It is enough that it has specified the powers, defined the class of property with respect to which they are to be operative, and limited the time during which they may be exercised. Cf. *Bowles v. Willingham*, *supra*, 515. The Trading With the Enemy Act as it existed during the First World War contained no statement of the policies which were to govern the exercise of the power to seize enemy property, yet in the many cases in this

Court sustaining its validity it was never suggested that it involved an improper delegation of legislative power. The regulatory powers of Section 5 (b) to which the vesting power was added in identical terms by Title III of the First War Powers Act have likewise been repeatedly sustained against the charge of an improper delegation of legislative authority. See as to Section 5 (b) as amended by the Act of March 9, 1933, 48 Stat. 1, *Campbell v. Chase National Bank*, 5 F. Supp. 156, 172-4 (S. D. N. Y.), affirmed, 71 F. 2d 669 (C. C. A. 2), certiorari denied, 293 U. S. 592; as further amended by the Joint Resolution of May 7, 1940 (54 Stat. 179), *United States v. Von Clemm*, 136 F. 2d 968 (C. C. A. 2), certiorari denied, 320 U. S. 769; and as further amended by the First War Powers Act, 1941, *Alexewicz v. General Aniline and Film Corp.*, 181 Misc. 181, 193, 43 N. Y. S. 2d 713, 726 (Sup. Ct.); see *Hartmann v. Federal Reserve Bank of Philadelphia*, 55 F. Supp. 801, 804 (E. D. Pa.). And, viewing Section 5 (b) as authorizing exercise of the power of eminent domain to the extent that it permits the taking of foreign property upon payment of such compensation as the Constitution may require, it has never been the custom of Congress to define with rigidity the occasions for the exercise of the power of eminent domain. Cf., e. g., Act of August 18, 1890, 26 Stat. 316, as amended, 50 U. S. C. 171; Act of May 25, 1926, 44 Stat. 630,

40 U. S. C. 341; Act of March 1, 1929, 45 Stat. 1415,
as amended, 40 U. S. C. 361.

CONCLUSION

For the foregoing reasons, the judgment of the
Circuit Court of Appeals for the Second Circuit
be affirmed.

Respectfully submitted.

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✓

APPENDIX

Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-31):

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

Sec. 5. [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b)]:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered,

liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1916, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * *

(c) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, as-

signed, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. * * *

SEC. 8 (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or

demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

* * * *

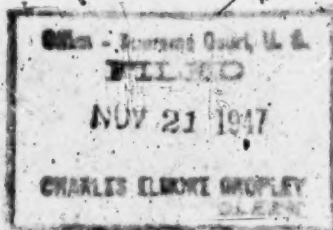
SEC. 9 [as amended]:

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity

in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

FILE COPY



No. 6

In the Supreme Court of the United States

OCTOBER TERM, 1947

**SILESIA AMERICAN CORPORATION, DEBTOR, AND
SILESIA HOLDING COMPANY, PETITIONERS**

**TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 6

SILESIAN AMERICAN CORPORATION, DEBTOR, AND
SILESIAN HOLDING COMPANY, PETITIONERS

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

The Supplemental Brief of Petitioners asserts that the Custodian's vesting order in this case did not purport to vest any interest of the Swiss Banks and that, therefore, the Custodian is not entitled to possession of the shares, but only of the equity interest of Non Ferrum and Giesche's Erben in them (pp. 2-3, 5, 6). This argument ignores the holding of the District Court (R. 49), from which the Swiss Banks did not appeal, that the Swiss Banks had established no interest in the shares. And in any event the argument rests upon a faulty premise.

(1)

The petitioners, in effect, assume that the Custodian has merely vested the right, title, and interest of Non Ferrum and Giesche's Erben in the shares. The Custodian has frequently issued orders which in terms vest "all right, title, and interest" of named persons in described property. See e. g. *Clark v. Allen*, 331 U. S. 503; *Kahn v. Garvan*, 263 Fed. 909 (S. D. N. Y.). Here, however, he did not issue such a "right, title, and interest" order; he vested the shares themselves. His vesting order (R. 14-15) describes certain property—50,000 shares of preferred and 98,000 shares of common stock—and "vests *such property* in the Alien Property Custodian" (R. 15). [Italics supplied.] And if any doubt should exist as to his intention to vest the shares themselves, it is removed by the position which he has taken in this litigation.

The petitioners' argument is that this very explicit description by the Custodian of the thing vested is in some way qualified and cut down by the determination that the shares were owned by Non Ferrum and held for the benefit of Giesche's Erben. Nothing in these determinations purports to define the property vested, and we do not see how they could possibly be construed as altering the very explicit declaration of the order that the shares, and not merely some interest in them, were vested. Indeed, we think the Custodian's deter-

mination that Non Ferrum and Giesche's Erben were the nominal and beneficial owners, respectively, of the shares, if it has any relevance at all to the question of what the Custodian vested, must be read as a determination that on the facts before the Custodian no other interest in the shares was shown to exist. If at some future time the Swiss Banks can show that that determination was erroneous, it may be that the Custodian would, upon proper application to him under Section 32 of the Act, make an administrative return of any interest which the Swiss Banks could establish. And those Banks would have the undoubted right to attempt to establish their interest in an appropriate judicial proceeding brought after the shares had come into the Custodian's hands. But we do not see how any such error in the Custodian's determination, assuming that it can be shown to exist, could warrant a reading of his vesting order as effective to vest less than the entire shares.

The petitioners' argument amounts in reality to a contention that if, at any time after a vesting order has been issued, someone not specifically referred to in that order asserts an interest in the property vested, the vesting order becomes ineffective as to that asserted interest and the Custodian can take no action to enforce it until he makes a new determination and issues a new order saying, in effect, that he meant what he said in his original

4

order. We think that the Act plainly does not contemplate such a dilatory procedure. Section 5 (b) calls for an initial determination that property should be vested, but it contemplates that once that initial determination has been made the property shall forthwith be turned over to the Custodian. It is enough that the Custodian has acted, by vesting the described shares and requiring the delivery of certificates to him, and that adequate administrative and judicial remedies are available in case any property or interest therein was improperly vested, or in case it is determined that the national interest does not require its retention. It is well settled that the enforcement of a vesting order according to its terms cannot be delayed by interposition of issues as to the correctness of the administrative determinations which led to its issuance. As Judge Learned Hand said in the court below (R. 68-9):

The power of the United States peremptorily to reduce to its possession and apply to its use, at moments critical in its history, all property which lies within its power is not to be emasculated by the delays of private litigation; the peril may be overwhelming, the need imperative. It is enough that reparation will be available, where reparation is due; meanwhile the individual must comply with the immediate demand just as he must comply with the immensely more

grievous demand for the possible sacrifice
of life and limb, when that too is called for.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DAVID L. BAZELON,
Assistant Attorney General.

M. S. ISENBERGH,
Special Assistant to the Attorney General.

JAMES L. MORRISON,
Attorney.

NOVEMBER, 1947.

FILE

IN THE

Supreme Court of the United States

October Term 1946

No. 364

146

6

**SILESIA AMERICAN CORPORATION, Debtor
and SILESIA HOLDING COMPANY,**

Petitioners,

against

JAMES E. MARKHAM, Alien Property Custodian,

Respondent.

PETITION FOR REHEARING

GEORGE W. WHITESIDE,

**Counsel for petitioners, Silesian-
American Corporation, Debtor,
and Silesian Holding Company.**

**LEONARD P. MOORE,
WILLIAM GILLIGAN,**

Of Counsel.

INDEX

	PAGE
Preliminary Statement	1
Reasons for Requesting Rehearing	2
The Conflict With the Judiciary Committee of the Senate	2
The Conflict With the Decision of the Court of Appeals for the District of Columbia	9
Conclusion	13
Certificate of Counsel	14
Appendix	
Opinions of the Court of Appeals for the District of Columbia in Uebersee Finanz Korporation v. Markham	15
TABLE OF BILLS, HEARINGS, REPORTS, ETC., CITED	
H. R. 5089, 79 Cong. 2d Ses.	2
H. R. 6890, 79 Cong. 2d Ses.	4, 6
Hearings Before Sub-Committee No. 1 of the Committee on the Judiciary, House of Representatives, 79 Cong. 2d Ses., on H. R. 5089	4
House Report No. 2398, 79 Cong. 2d Ses.	5
S. 2378, 79 Cong. 2d Ses.	6

Hearings Before a Sub-Committee of the Committee on the Judiciary, United States Senate, 79 Cong. 2d Ses., on S. 2378	5
Senate Report No. 1839, 79 Cong. 2d Ses.	5
92 Cong. Rec. p. 10346	7
92 Cong. Rec. Appendix p. 4805	7
92 Cong. Rec. p. 10545	8
First War Powers Act, 1941 (55 Stat. 839)	6, 8
Trading With the Enemy Act §5(b)	2, 6, 8, 9, 10, 11, 12
§7(c)	5, 6
§8(a)	9, 10, 12
§9(a)	6, 8, 9, 10, 11

TABLE OF CASES CITED

Becker Steel Company v. Cummings, 296 U. S. 74	11
Central Union Trust Company v. Garvan, 254 U. S. 554	11
Markham v. Cabell, 326 U. S. 404	11
Stoehr v. Wallace, 255 U. S. 239	11
Uebersee Finanz Korporation v. Markham (cited by Court of Appeals, District of Columbia, Oct. 21, 1946 and printed in Appendix)	2, 9, 10

IN THE
Supreme Court of the United States

October Term 1946

No. 346

**SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,**

Petitioners,

against

JAMES E. MARKHAM, Alien Property Custodian,

Respondent.

PETITION FOR REHEARING

*To the Honorable Fred M. Vinson, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

The petitioners respectfully request reconsideration of their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, which this Court denied on October 14th, 1946.

Preliminary Statement

The decision which the petitioners seek to have reviewed has to do with the construction placed upon Section 5(b) of the Trading With the Enemy Act, as amended, in an opinion by Judge Learned Hand.

Reasons for Requesting Rehearing

(1) Since the decision of the Circuit Court of Appeals for the Second Circuit was handed down on July 3rd, 1946, the Judiciary Committee of the Senate, having before it a copy of Judge Learned Hand's opinion in the case at bar has expressly placed a construction on §5(b) of the Trading With the Enemy Act as amended that is in conflict with that set forth in the opinion of Judge Learned Hand, and both houses of Congress have accepted and acted upon the construction of §5(b) as so declared by the Judiciary Committee of the Senate.

(2) Since the denial of petitioners' application the Court of Appeals for the District of Columbia has handed down a decision in the case of *Uebersch Finanz Korporation v. Markham* with an opinion construing §5(b) as amended which is in conflict with the opinion of Judge Learned Hand of the Circuit Court of Appeals for the Second Circuit in the case at bar.

1. The Conflict With the Judiciary Committee of the Senate

In December 1945 H. R. 5089 was introduced by Representative Sumners, Chairman of the House Committee on the Judiciary, for consideration by the Second Session of the 79th Congress. Apparently from comments made during the hearings, the bill was prepared in the Office of the Alien Property Custodian.

§33 of H. R. 5089 contained *inter alia* the following provisions:

"Sec. 33. (a) A foreign country or national thereof within the meaning of section 5(b) hereof may not institute, prosecute, or further maintain a

suit pursuant to section 9(a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof.

“(b) Notwithstanding the provisions of section 7(c) hereof, suit may be instituted by any person not an enemy or ally of enemy against the United States in the Court of Claims for just compensation in respect of any property or interest taken from the plaintiff and vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), but the complaint in such suit shall be dismissed on the merits unless the plaintiff establishes that he is a person entitled to just compensation by virtue of the last clause of the fifth amendment to the Constitution of the United States.”

Hearings were held on the bill before a sub-committee of the House Committee on the Judiciary in February and May, 1946. Prior to the hearings and under date of February 4th, 1946, Mr. Byrnes as Secretary of State, addressed a letter to the Chairman of the House Committee on the Judiciary in which he objected to subdivision (b) quoted above on the ground that its effect was to deny to a friendly alien the right to obtain a return of his property and to substitute only such rights for just compensation as are granted by the Fifth Amendment, as to which he stated that the Department of Justice claims that a friendly alien does not have any rights under the Fifth Amendment to just compensation. Mr. Byrnes declared that the clause carried a grave threat to the rights of American nationals in foreign countries, and if the position of the Department of Justice is correct, would relegate friendly aliens to a

position of being without remedy for the seizure of their property except for Mr. Markham's suggestion that these rights be handled by diplomatic representations, to which suggestion the Department of State strongly objected both on principle and on grounds of enlightened self-interest. The full text of Mr. Byrnes' letter is set forth in full in the report of the hearings (*Hearings Before Sub-Committee No. 1 of the Committee on the Judiciary, H. R., 79th Cong. 2d Sess., on H. R. 5089, pp. 28-29*).

As a result of this objection, representatives from the offices of the Alien Property Custodian, the Attorney General and the Secretary of State seemed to have gotten together and prepared an amendment to §33 of the bill designed to overcome the objection of the Secretary of State by omitting the reference to the Fifth Amendment in subdivision (b) and substituting in place thereof a very complicated method for determining who would be entitled to sue in the Court of Claims and the conditions under which such suits should be prosecuted. Subdivision (a) was substantially retained. The bill as so amended is set forth in the report of the hearings, before the sub-committee (*supra*) at pp. 43 *seq.*

Various persons appeared before the House sub-committee for and against this bill and in the course of the hearings Representative Celler in response to the statement that the Constitution is not suspended during the time of war remarked (*House Hearings, p. 78*), "Let us be realistic. It (the Constitution) is certainly put in cold storage during the war * * *".

On June 26th, 1946 Representative Sumners introduced the bill in its amended form as H. R. 6890. The following

day the Committee on the Judiciary favorably reported the bill as so amended (*House Report No. 2398, 79th Cong. 2d Ses.*).

In the bill as so reported subdivision (a) of §33 remained substantially the same as above quoted and subdivision (b) was entirely rewritten so as to provide that notwithstanding the provisions of §7(c) a person whose property had been taken by the Alien Property Custodian could proceed in the Court of Claims for just compensation upon complying with numerous conditions in the bill set forth (*House Report, pp. 23 seq.*).

About the same time a bill identical with H. R. 6890 was introduced in the Senate as S. 2378. At the Senate hearings which were held in July 1946 a number of persons appeared in opposition to §33 (*Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 79th Con., 2d Ses. on S-2378*). It was urged that the bill repealed existing law which permitted friendly aliens to recover their seized property under the provisions of §9(a) (*Senate Hearings, pp. 37, 40, 84*); that the denial to a foreign country or national thereof of the right to proceed under §9(a) was unconstitutional as lacking due process (*Senate Hearings, pp. 40, 58 seq.*); that it would discriminate against friendly aliens (*Senate Hearings, pp. 68, 89*) and violate treaties of friendship (*Senate Hearings, p. 42*); that it would produce a hostile feeling among foreign nations and bring about retaliation (*Senate Hearings, p. 62*); that it would invite a repetition of policies of expropriation such as occurred in Mexico some years ago (*Senate Hearings, p. 64*); and that the enactment of such a section would cause a great deal of harm and detriment

from the public relations and advertising point of view in our efforts to promote foreign trade (*Senate Hearings*, p. 87).

For the purpose of meeting these arguments, representatives of the Alien Property Custodian and the Attorney General claimed that the effect of the amendments to §5(b) by the First War Powers Act, 1941, was to modify §9(a) so as to deny to friendly aliens the rights which they previously enjoyed (*Senate Hearings*, pp. 97 and 98) and in support of this contention, the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar (*Silesian-American Corporation v. Markham*) was cited, and a copy of the opinion by Judge Learned Hand was placed in the record (*Senate Hearings*, p. 99). In taking this position neither the representative of the Alien Property Custodian nor the Attorney General attempted to explain, and the Committee did not attempt to ascertain, why the proposed §33 was desirable, if as they alleged, the same effect had already been achieved by the amendments to §5(b) in 1941.

In making its report on S. 2378 (H. R. 6890) the Senate Committee on the Judiciary (*Senate Report No. 1839, 79th Cong. 2d Sess.*) struck out §33 entirely. In doing this, of course, they eliminated the provisions which denied to friendly foreign countries and the nationals thereof the right to recover seized property under §9(a) of the Trading With the Enemy Act, and also the provision that notwithstanding §7(c) of that Act, just compensation could be obtained by a suit in the United States Court of Claims. In explaining this deletion the Committee said (*Report*, p. 2):

“ * * * The purpose of this amendment is to eliminate the proposals to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a). *The bill as thus amended preserves in full these rights under 9(a), which the friendly foreign national, together with United States citizens has had for more than 25 years under the act.*” (Italics supplied.)

The report of its Judiciary Committee was filed in the Senate on July 26th, and on the same day Representative Celler submitted to the House a copy of the bill as reported in the Senate and asked for a suspension of the rules so that the revised bill could be voted upon (92 Cong. Rec. 10346).

In the discussion which attended the passage of the bill the elimination of §33 was referred to and Representative Philbin inquired (92 Cong. Rec. A. 4805):

“If Section 33 is eliminated from this bill, then the law as then written would give to foreign friendly nationals the right to be sued and to sue in our courts and have their rights adjudicated?”

To this inquiry Representative Celler replied:

“I may say to the gentleman that the elimination of Section 33 gives the right to a foreign national to sue for the return of his property, either in law or in equity. That does not apply to an enemy alien, only to a friendly foreign national. *That right remains unchanged if we eliminate Section 33.*” (Italics supplied.)

The rules were thereupon suspended by a two-thirds vote and the bill passed by the House.

The bill so passed by the House was brought up in the Senate on July 29th and passed with four minor amendments not included in the report of its Judiciary Committee (92 *Cong. Rec.* 10515). These amendments made from the floor of the Senate, required that the bill again go before the House, and the additional amendments were concurred in by the House on July 30th, 1946 (92 *Cong. Rec.* 10627).

It will thus be seen that the opinion of Judge Learned Hand in the case at bar was submitted to the Senate Committee on the Judiciary as authority for the proposition that the effect of the amendments to §5(b) contained in the First War Powers Act, 1941, was to deprive friendly aliens of the right to recover in a proceeding under §9(a) property vested by the Alien Property Custodian and to relegate them to a suit in the United States Court of Claims to recover just compensation. With this opinion before them the Senate Committee on the Judiciary nevertheless expressly stated that by eliminating provisions designed to conform the statute with the construction placed upon §5(b) by Judge Learned Hand, it was the purpose of the Committee to preserve in full those rights under §9(a) which friendly foreign nationals, together with United States citizens, had had for more than 25 years.

The result is a distinct and sharp conflict between the effect of §5(b) as amended as construed by Judge Learned Hand and as understood by the Judiciary Committee of the Senate.

In passing the bill both the House of Representatives and the Senate acquiesced in the interpretation of the

statute declared by the Judiciary Committee of the Senate, and a serious question has thereby been raised as to the significance which should be attached to the opinion of Judge Learned Hand. This question can only be resolved by having the matter reviewed in this Court.

While it is true that the opinion expressed by the Judiciary Committee of the Senate and acquiesced in by both houses of Congress was addressed to §9(a), and the case now at bar has to do with §8(a), the wording of the two sections so far as they affect the rights of friendly aliens are identical, and if in §9(a) the meaning of the words "any person not an enemy or ally of enemy" was not changed by the amendments to §5(b), it necessarily follows that no change was made in the meaning of the same words in §8(a), and if under §9(a) a friendly alien may still sue to recover possession of vested property, then, under §8(a) a friendly alien may retain possession of property held by such friendly aliens as pledgees.

2. The Conflict With the Decision of the Court of Appeals for the District of Columbia

Since the denial of petitioners' application the Court of Appeals for the District of Columbia has handed down a decision in the case of *Uebersee Finanz Korporation v. Markham* which is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar.

In the opinion of Judge Learned Hand below, he stated in effect that a friendly alien could not under the provisions of §9(a) recover property that had been vested by the Custodian, but was required to seek just compensation on an

implied promise in the Court of Claims (R. 66-67)¹. Aside from constitutional considerations, this conclusion as to the effect of §5(b) upon §9(a) was necessary for the purpose of determining the effect of §5(b) on §8(a), because the pertinent wording of §8(a) was identical with the wording of §9(a). The difference between the two sections was the fact that §8(a) authorized a non-enemy pledgee to retain possession of enemy property against seizure by the Custodian whereas §9(a) authorized a non-enemy owner to recover property which the Custodian had seized.

In arguing before the Circuit Court for the construction adopted by Judge Learned Hand the Custodian laid great emphasis upon the decision by the District Court in the *Uebersee Finanz Korporation* case and the several other unreported District Court cases said to have applied a similar construction. The several cases on which the Custodian relied are set forth at page 5 of the respondent's brief in this Court.

The Court of Appeals for the District of Columbia on October 21st, 1946 (since the denial of the petition herein), reversed the decision of the District Court, and held that §5(b) as amended should not be construed as preventing a friendly alien from recovering possession of vested property under the provisions of §9(a). The prevailing and dissenting opinions have not yet been reported and copies thereof are set forth in the Appendix hereto.

¹ In Judge Hand's opinion it was said (R. 67) that "It so chanced that both the debtor and the Custodian take the position that a friendly alien may not sue under §9(a)". This statement was erroneous and apparently due to a misapprehension of the petitioners' argument, which had been that if the construction placed upon §5(b) by the Custodian were correct, a friendly alien could not sue to recover vested property.

As to the effect of §5(b) as amended on §9(a) the prevailing opinion states (*infra*, p. 19):

“ * * * In any event, to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do. See *Becker Steel Co. v. Cummings*, 296 U. S. 74; *Stoehr v. Wallace*, 255 U. S. 239; *Central Union Trust Co. v. Garvan*, 254 U. S. 554. In our view, what was said by the Supreme Court in the recent case of *Markham v. Cabell*, 326 U. S. 404, is conclusive against such action. In that case, as in this, the Custodian contended that the amendment to §5(b) armed the Executive with far more comprehensive powers over enemy property and the property of other foreign interests, including friendly and allied interests, than in World War I, and that the effect of this was to withdraw the right to sue explicitly granted by §9(a) of the Act. But the Court rejected this claim, and expressly held that the right to sue granted by §9(a) should not be read out of the law.

“ We have found nothing and reason suggests nothing to indicate that the dominant purpose of the Act—the elimination of enemy influence in our economy—has been changed, or that the calamity of war was to be used to eliminate and destroy *all* alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of §5(b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest.

And that this is true is definitely shown, we think, in the fact that Congress has twice refused to write the Custodian's present construction into the law. But even if that conjecture be dismissed, there is nothing to support the theory of the Custodian that the new legislation eliminated all remedy as to all foreign rights. For obviously, such a purpose would run headlong into constitutional objections."

If such is the effect of §5(b) as amended on §9(a), it would not be logical to conclude that §5(b) as amended has a different effect on §8(a). If despite the provisions of §5(b) as amended a friendly alien may recover from the Custodian property vested under §9(a), a friendly alien under §8(a) may likewise retain the possession of property held as a pledgee. In his opinion Judge Hand conceded that such would be the result, when he said (R., p. 67):

"* * * It is true that in the original Act, §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; and, for argument, we will assume that it forbade disturbing the possession of any pledgee who was not himself an enemy or an ally of enemy."

If the prevailing opinion of the Court of Appeals in the *Uebersee* case correctly construed the effect to be given to §5(b) as amended, then §8(a) withheld from the Custodian any power to take possession of pledged property held by friendly aliens and any vesting order issued by the Custodian in an attempt to do so was obviously wrongfully issued and invalid.

It is therefore evident that the conflict between the Circuit Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia as to the construction to be placed on §5(b) as amended is a conflict of basic

importance in the case at bar, and if the decision of the Court of Appeals in the *Uebersee* case, reflecting as it does the opinion of Congress, correctly construed §5(b), it necessarily follows that the decision of the Circuit Court in the case at bar should be reversed.

Conclusion

The existing conflict between the opinion expressed by Judge Learned Hand in the Court below and the opinion expressed by the Judiciary Committee of the Senate and acquiesced in by both houses of Congress, together with the conflict between Judge Hand's opinion and that of Chief Justice Groner of the Court of Appeals for the District of Columbia make it absolutely essential that this Court should review the decision herein of the Second Circuit and determine which of these eminent authorities has correctly interpreted the law.

Wherefore petitioners respectfully urge that a rehearing of their petition for a writ of certiorari be granted and that upon further consideration the order of October 14th, 1946, denying the petition for certiorari be revoked, that the writ of certiorari issue, and that the petitioners have such other further and different relief as to this Court may seem just.

Respectfully submitted,

GEORGE W. WHITESIDE,
Counsel for petitioners, Silesian-
American Corporation, Debtor,
and Silesian Holding Company.

LEONARD P. MOORE,
WILLIAM GILLIGAN,

of Counsel.

Certificate

I, GEORGE W. WHITESIDE, counsel for the above named petitioners, Silesian-American Corporation, Debtor, and Silesian Holding Company, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

GEORGE W. WHITESIDE,
Counsel.

Appendix

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

No. 9187.

UEBERSEE FINANZ-KORPORATION, A. G., APPELLANT,

v.

JAMES E. MARKHAM, as Alien Property Custodian, APPELLEE.

Appeal from the District Court of the United States for the
District of Columbia.

Argued May 28, 1946.

Decided October 21, 1946.

Mr. Richard J. Connor, with whom *Mr. Bart W. Butler* was on the brief, for appellant.

Mr. Herbert Wechsler, Special Assistant to the Attorney General, with whom *Mr. Harry LeRoy Jones*, Special Assistant to the Attorney General, was on the brief, for appellee. *Mr. Wallace H. Walker*, Department of Justice, also entered an appearance for appellee.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

GRONER, C. J.: The decision in this case turns upon the question whether the amendment of §5(b) of the Trading with the Enemy Act by Title III of the First War Powers Act of 1941 has, by necessary implication, the effect of nullifying and rendering impotent §9(a) of the original

Act.¹ Or, stated more concisely, whether the amendment of §5(b) in 1941, of itself and without more, renders inoperative the rights conferred under §9(a) of the original Act.

Appellant is a corporate national of Switzerland and at the outbreak of World War II was the owner of certificates of stock in sundry American corporations. The Alien Property Custodian, under authority of amended §5(b) and under Executive Orders 9065 and 9193, seized appellant's property as the property of a "foreign country or national thereof" and vested the same in himself. Since precisely this procedure is authorized under that section, obviously no exception can be had to this. But at that point appellant, claiming the right to recover the vested property under the provisions of §9(a) of the Act, brought this suit, alleging, among other things, that before and at

¹ 50 U. S. C. War App. §9(a), 41 Stat. 977, provides: "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property * * * conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him * * * may institute a suit in equity * * * in the district court of the United States * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

50 U. S. C. Supp. V, War App., §616, 55 Stat. 839, 840, amending §5(b) of the Trading with the Enemy Act, provides: "During the time of war * * * any property or interest of *any foreign country or national thereof* shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, * * *." (Italics supplied.)

the time of the seizure it was a citizen of Switzerland; that it was not an enemy or ally of ~~enemy~~; that it was not a "national of a designated enemy country" and that the property was not then nor at any other time held for the benefit of an enemy or ally of enemy, nor for the benefit of a "national of a designated enemy country."

The Custodian filed a motion to dismiss on the ground that the complaint failed to state a valid cause of action, and the District Court, without opinion, granted the motion. From that action this appeal is taken.

The basis of the motion to dismiss is that it appears on the face of the complaint that appellant is a national of a foreign country and, this being conceded, the Custodian insisted and now insists that under the amended §5(b) the vesting is absolute and not subject to attack.^{1a} To avoid conflict with the constitutional prohibition against the tak-

^{1a} The language of amended §5(b) as to vesting is—"Such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." And the position of the Custodian is that this language vests the property in the Custodian unqualifiedly and completely. The language used is broad, but it is no broader than the language used in the vesting provision of the original Act (Act of March 28, 1918, amending §12 c. 28, 40 Stat. at L. 459-460), wherein the Custodian was given the power to sell and manage such property as though he were the absolute owner. But on a similar claim under that provision the Supreme Court, in *Central Union Trust Co. v. Garvan*, *infra*, said:

"All this may be conceded if no claim is filed. But this act did not repeal §9, which is amended by the later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result."

ing of property of friendly aliens without just compensation, which such a construction would raise, the Custodian suggests that appellant may obtain just compensation by way of suit against the United States in the Court of Claims. But that suggestion conflicts with §7(c) of the Act,² which provides—"The sole relief and remedy of any person having any claim to any money or other property . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of this Act," i. e., §9(a). Thus appellant's right of recovery, if it has any, is limited by statutory terms to a suit under §9(a), for only to that extent and in that manner has the United States consented to be sued. *Pflueger v. United States*, 73 App. D. C. 364, 121 F. (2d) 732, cert. den. 314 U. S. 617; *Sigg-Fehr v. White*, 52 App. D. C. 215, 285 Fed. 949.

It will thus be seen that the Custodian's position is not only that the vesting of the property is within the authority delegated to him—which is not denied—but also that §9(a) of the Act, which specifically confers jurisdiction on the several district courts to entertain a proceeding to inquire into the question whether the seized property is owned by "an enemy or ally of enemy," and if not so owned, to order its return, is, since the passage of the amendment to §5(b), inapplicable in the case of property owned by any foreign national which has been seized by the Custodian.

The Custodian attempts to avoid the stark obliteration from §9(a) of the words "Any person not an enemy or ally of enemy", by saying that that section limits recovery to "the interest therein" of the claimant, and accordingly

² 50 U. S. C. War App. §7(c).

the Custodian insists there may be no recovery here because seizure under amended §5(b) destroys all interests of all aliens in seized property. But there is nothing in §5(b) to sustain this view and to adopt it would read into that section words that are not there and at the same time, and with just as little warrant, read out the quoted words from §9(a). This assumes, we think, too much. In any event, to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do. See *Becker Steel Co. v. Cummings*, 296 U. S. 74; *Stoehr v. Wallace*, 255 U. S. 239; *Central Union Trust Co. v. Garvan*, 254 U. S. 554. In our view, what was said by the Supreme Court in the recent case of *Markham v. Cabell*, 326 U. S. 404, is conclusive against such action. In that case, as in this, the Custodian contended that the amendment to §5(b) armed the Executive with far more comprehensive powers over enemy property and the property of other foreign interests, including friendly and allied interests, than in World War I, and that the effect of this was to withdraw the right to sue explicitly granted by §9(a) of the Act. But the Court rejected this claim, and expressly held that the right to sue granted by §9(a) should not be read out of the law. The Supreme Court said:³ “We can find no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §3(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole.”

³ 326 U. S. 404-411.

Read as we read them, §5(b) as amended and §9(a) do not conflict, but rather constitute a reasonable program to meet the emergency of war. Under the Act as it was in World War I, the seizure of alien property was limited to that of enemies, and the seizure was "after investigation." Thus, a determination of enemy ownership was a prerequisite to seizure.⁴ A more expeditious procedure to assure quick protection of our economy against enemy influence was to seize initially *all* alien property, and then upon investigation and with the burden of producing the facts placed upon the claimant rather than upon the Custodian, to return the property of aliens not enemies. Amended §5(b) and §9(a), when read together, prescribe exactly that procedure. The amendment of §5(b) did not nullify §9(a), nor was it inconsistent therewith. Indeed, it seems to us that the haste imposed by war required additional assurance against unwarranted seizure.

We have found nothing and reason suggests nothing to indicate that the dominant purpose of the Act—the elimination of enemy influence in our economy—has been changed, or that the calamity of war was to be used to eliminate and destroy *all* alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of §5(b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest. And that this is

⁴ The Custodian says that a summary determination was sufficient. Whether summary or not, the statute made the investigation a preliminary and not a subsequent step to seizure.

true is definitely shown, we think, in the fact that Congress has twice refused to write the Custodian's present construction into the law.⁵ But even if that conjecture be dismissed, there is nothing to support the theory of the Custodian that the new legislation eliminated all remedy as to all foreign rights. For obviously, such a purpose would run headlong into constitutional objections.

Accordingly, it seems to us quite clear that neither the language of the amendments nor the policy of Congress, as shown by the revised legislation, contemplated the position taken by the Custodian here. It follows, therefore, that the judgment below must be reversed and the case remanded for trial in accordance with the views expressed in this opinion.

Reversed and Remanded.

EDGERTON, J., *dissenting*: Section 9(a) still gives a remedy, as it always did, against unauthorized takings of property. But taking the property of a friendly alien is now expressly authorized by §5(b). As the court concedes, the property in suit "vested" in the Custodian. The vesting for which §5(b) provides is unqualified and complete. The property may be "used, . . . sold, or otherwise dealt with" by the Custodian. This precludes retention by appellant of any interest in the property.

⁵ H. R. 4840, 78th Cong. 2nd Sess. (died in Committee). H. R. 5089, 79th Cong. 2nd Sess. (reintroduced as H. R. 6890, 79th Cong. 2nd Sess.), contained in §33 provision that "a foreign * * * national * * * may not * * * maintain a suit pursuant to 9(a) hereof." This section, together with an identical section contained in S. 2378, 79th Cong. 2nd Sess., was deleted and the remainder of the bill was passed.

The policy of §5(b) is clear. Nominal ownership by nominal neutrals is often a front for, or otherwise equivalent to, enemy control. Such arrangements are often hard to detect and usually harder to prove. To defeat them, Congress authorized the Custodian to vest in himself the property of any foreign national. It does not appear that they can be defeated otherwise.*

I do not understand how §9(a) can be thought to give appellant a claim to recover property which is no longer his. The court states that §9(a) specifically confers jurisdiction to inquire whether seized property is owned by an enemy or ally of enemy, and if not so owned, to order its return. I cannot find this provision in §9(a). What this section, as I read it, specifically confers is jurisdiction to award to a claimant whose "interest" or "title" is "established . . . the . . . property . . . or the interest therein to which the court shall determine said claimant is entitled." Appellant has no interest or title in the property in suit, since the property is vested unqualifiedly in the Custodian.

Compensation for the taking of the property is a different matter. The Tucker Act, 28 U. S. §250, permits recovery in the Court of Claims on any claim "founded upon the Constitution of the United States or any law of Congress . . . [or] upon any contract, express or implied, with the Government of the United States . . ." And "it is settled by many decisions of which we need only cite the last—*Yearsley v. Ross*, 309 U. S. 18—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly prom-

* This paragraph did not appear in the original opinion but was added by Mr. Justice Edgerton on October 25th.

ises to pay just compensation, and that that promise is 'just compensation' under the Fifth Amendment." *Silesian-American Corp. v. Markham* (C. C. A. 2d; decided July 3, 1946). The former owner's claim to compensation is not affected by the provision in §7(c) that "the sole relief and remedy of any person having any claim to any money or other property . . . transferred" shall be that provided by the Act, since a claim to compensation for the taking of property is not a claim to the property. Accordingly I see no constitutional difficulty in the statutory scheme.

op. 5-9-6

SUPREME COURT OF THE UNITED STATES

No. 6.—OCTOBER TERM, 1947.

Silesian American Corporation, Debtor,
and Silesian Holding Company, Petitioners,

v.

Tom C. Clark, Attorney General, as
Successor to the Alien Property Custodian.

On Writ of Certiorari to the
United States
Circuit Court
of Appeals for
the Second
Circuit.

[December 8, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

The Alien Property Custodian on November 17, 1942, executed Vesting Order No. 370. This order was issued under the authority of the Trading with the Enemy Act, 40 Stat. 411, as amended, and Executive Order No. 9095, as amended, and in terms vested the property therein described in the Alien Property Custodian in the interest and for the benefit of the United States. The order found the property to belong to a national of Germany. The property covered by the order was two blocks of stock—one common, one preferred—in the Silesian American Corporation, a Delaware corporation, hereinafter called Silesian. The stock, prior to August 31, 1939, stood in the stock book of Silesian in the name of Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nicht-eisenmetalle, Zurich, Switzerland, a Swiss corporation, hereinafter referred to as the Non Ferrum Company. Non Ferrum, it was determined by the Custodian's order, held the stock for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben, a German corporation. The certificates, it is asserted, had been deposited as security for loans with a group of banks, all of which apparently

were chartered by Switzerland and are hereinafter referred to as the Swiss Banks.¹

To carry out the purpose of his vesting order, the Custodian directed Silesian to cancel on its books the outstanding Non Ferrum certificates, above referred to, and to issue in lieu thereof new certificates to the Custodian. This controversy revolves around the objection of Silesian so to act because the Custodian did not have physical possession of the pledged Non Ferrum certificates so as to be able to surrender them for cancellation, as the corporation's by-laws required. Silesian feared liability to the holders of the Non Ferrum certificates for issuing other certificates in such circumstances.

Silesian had been a debtor under Chapter X of the Bankruptcy Act since July 30, 1941. It therefore asked the Bankruptcy Court for instructions as to its compliance with the Custodian's direction. The other petitioner here, Silesian Holding Company, a Delaware corporation also, appeared and throughout has remained as a party to this litigation. It is the majority stockholder of Silesian, but claims no different or other interest in the issue than Silesian. For the purpose of this case, it may and will be treated as having no more interest in the issue than Silesian has. The Swiss Banks asked the Reorganization Court to give instructions to the Debtor that no new shares be issued until the controversy between the Swiss Banks and the Custodian could be "fully, firmly and finally adjudicated." This prayer was based on a verified answer to Silesian's request for instruction, which answer alleged that the "Swiss Banks were the owners of the 'Non Ferrum' stock." The Swiss Banks notified Silesian that any issue of new certificates representing the Non Ferrum stock, with or without court direction, would be at Sile-

¹ They are Union Bank of Switzerland, LaRoche & Company, Banque Cantonale de Berne, and Aktiengesellschaft Leu & Company.

sian's risk. Affidavits supporting the objection of the Swiss Banks to instructions to Silesian to issue the new certificates to the Custodian were filed with the District Court. These affidavits declared the Non Ferrum stock was pledged, prior to 1938, to groups of Swiss banks. It is not clear whether they are the same institutions that are named in the answer of the Swiss Banks to the Debtor's request for instructions. For the purpose of this case, we assume that the groups are identical.

The District Court instructed the debtor to issue new certificates to the Alien Property Custodian. The court said:

"The vesting order of the Custodian found that the stock was held for the benefit of an enemy. The statutory discharge from liability, § 5b or § 7e, [Trading with the Enemy Act] protects the debtor corporation and relieves it of doubt in the premises."

The court added:

"Whatever may be the interests or rights of the Swiss banks, they cannot be considered here. Hearsay statements, unsupported by documents, allege that these banks are pledgees of the stock. These statements create no issue for our consideration. The banks are parties herein only to the extent that they have been recognized in the reorganization proceeding as possible owners of a claimed interest which they have never been called upon to prove. They are not here because of any action taken against them or any recognition given them by the Custodian or even by reason of any established interest in the stock."

No appeal to the Circuit Court of Appeals was taken by the Swiss Banks. They do not appear here as parties to this writ of certiorari or otherwise. We therefore express

no opinion as to the effect of the order and decision of the District Court upon the claims of the Swiss Banks as pledgees of the Non Ferrum stock. See *Silesian-American Corporation v. Markham*, 156 F. 2d 793, 795.

An appeal was taken to the Circuit Court of Appeals by Silesian. That court affirmed the order of the Bankruptcy Court. We first denied a petition for certiorari and then granted it so that this case might be considered in relation to other issues, thereafter presented here, in connection with the administration of the Trading with the Enemy Act. 329 U. S. 730 and 330 U. S. 852; *Clark v. Uebersee Finanz-Korporation*, 330 U. S. 813.

It was held by the Circuit Court of Appeals that Silesian had no "standing vicariously" to assert the interests of its shareholders. We agree. Silesian has no legal interest in the issue as to the ownership of its stock. It follows that Silesian has no standing to represent the interests of the pledgees of the Non Ferrum shares, if that is the present position of those shares. See *Anderson Nat. Bank v. Luskett*, 321 U. S. 233, 242. This reduces petitioners' objection to the order directing the issue of new certificates in favor of the Custodian for the Non Ferrum stock to the claim that the sections of the Trading with the Enemy Act under which the Custodian acted are invalid as applied to Silesian in these circumstances. If the provisions do not authorize the order and direction, Silesian, over its own objections, cannot be compelled to obey.

The Custodian vested the stock in himself by virtue of the Trading with the Enemy Act, as amended by the First War Powers Act of 1941, including, of course, § 5 (b) (1),² and Executive Order No. 9095, C. F. R. Cum. Supp. 1121,

² Trading with the Enemy Act, 40 Stat. 411, as amended by the First War Powers Act of 1941, 55 Stat. 839, § 5 (b) (1):

"During the time of war or during any other period of national emergency declared by the President, the President may, through

as amended 1174. This property was vested during war. There is no doubt but that under the war power,³ as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property. *United States v. Chemical Foundation*, 272 U. S. 1, 11. Nor can there, we think, be any doubt that any property in this country of any alien may be summarily reduced to possession by the United States in furtherance of the war effort. Every resource within the ambit of sovereign power is subject to use for the national defense. This section was amended during war to cover the taking of alien property. It is limited to a war or a declared emergency period. While a natural hesitancy exists against so interpreting the war power clause as to

any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

“(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interests of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;”

³ Art. I, § 8, cl. 11.

expand its scope to cover incidents not intimately connected with war, we think reasonable preparation for the storm of war is a proper exercise of the war power. This seizure of alien property, in a time of emergency, is of that character. We need not consider whether the general welfare clause could be a source of congressional power over alien property. This taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of this government. Or the commandeered property of a friendly alien may be used to prosecute the war. The problems of compensation may await the judicial process. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 567-68. War brooks no delay. The Constitution imposes none.

The section, 5 (b) (1) (B), and Executive Order under which the Custodian acted authorized the vesting in him by his order of the property of a foreign national. This description covered stock ownership of a foreign national in Silesian. The fact that the certificates did not come into the hands of the Custodian is immaterial. They are

* Compare with the statement below: "The power of Congress to seize and confiscate enemy property rests upon Art. I, § 8, Clause 11 of the Constitution. *Stoehr v. Wallace*, supra, page 242; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 11. Whether it exists at international law may be doubted; but nobody contends that the war power of Congress includes the seizure of the property of friendly aliens. The amendment of § 5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed *flagrante bello*) but was to go into effect upon any 'national emergency declared.' It can rest upon Art. I, § 8, Clause 1: i. e. upon the power 'to provide for the common Defence and general Welfare'; indeed, so far as we can see, the debtor does not challenge the power itself, but its exercise. It complains that the amendment delegates an unrestricted discretion to the President, and does not provide 'just compensation' for seizures." 156 F. 2d 793, 796.

evidences of the property right of the foreign national in Silesian that is subject to be vested in the Custodian by the Act. See *Great Northern R. Co. v. Sutherland*, 273 U. S. 182. Section 5 (b) (1) (B) specifically states, "and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes." See note 2 above. Since the Custodian was authorized to vest and to sell the property by § 5, we think that the power to require the issue of new certificates was incidental to that authority. As one purpose of § 5 (b) (1) (B) was to authorize the seizure of the interests of foreign nationals in domestic corporations so that such interest could be used or sold, such authority to participate in management or to transfer the stock interests would be frustrated if customary evidences of the ownership could not be required from the corporation. The power of the Custodian to demand the certificates is plain. The correlative duty to obey the order equally so, if the effect of obedience does not do violence to other valid requirements of the statute or make Silesian liable to bona fide holders of the old stock.

Silesian in specific terms is protected from any liability to bona fide holders such as Non Ferrum or the Swiss Banks by reason of any infirmity in the Custodian's vesting order or his direction to Silesian to issue new certificates for the Non Ferrum stock. The applicable language of § 7 (e) of the Trading with the Enemy Act, 40 Stat. 418, and § 5 (b) (2), as amended, 55 Stat. 839-40, are set out in the margin.* But Silesian argues that pro-

* 40 Stat. 418, § 7 (e):

"No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

55 Stat. 840, § 5 (b) (2):

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any

tection cannot follow from an order contrary to the Trading with the Enemy Act. The order to issue the new certificates is said to be unauthorized because it allows the property of friendly alien pledgees, the Swiss Banks, to be taken contrary to § 8 (a).⁶ Section 8 (a) is said to be a limitation on the Custodian's power to seize property pledged to "any person not an enemy or ally of enemy." It is suggested that if § 7 (e) or § 5 (b) (2) is interpreted to require Silesian to carry out the Custodian's direction, even though this seizure is contrary to § 8 (a), a way has been found to "coerce an interested party [Silesian] into compliance with his [the Custodian's] unlawful actions." The answer to this contention is made by the Circuit Court of Appeals. It makes unnecessary any discussion of the protection afforded Silesian by § 7 (e) and § 5 (b) (2) from the claims of a pledge of stock exempted by statute from seizure. 156 F. 2d at 797. When § 5 (b) (1) (B) was enacted as an amendment in the First War Powers Act of 1941, it authorized the taking

rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

⁶ 40 Stat. 418-19, § 8 (a):

"That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand . . . may continue to hold said property, and, after default, may dispose of the property . . . *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

of any property or interest therein of any foreign national. This broadening of the scope of the Custodian's power to vest so as to include interests of friendly aliens in property includes the power to vest the interest which friendly aliens have from pledges. As the Circuit Court of Appeals said, p. 797:

"Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure."

Therefore, as we hold that § 5 (b) (1) ~~(B)~~ rendered § 8 (a) inapplicable to the property of friendly aliens, the order of the Custodian was valid and Silesian's objection disappears. d

Finally there is the argument that Silesian cannot be compelled to issue the new certificates because the friendly aliens who claim interests in the Non Ferrum stock may not succeed in recovering the just compensation for the taking. See *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489. The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. *Russian Fleet v. United States*, *supra*. We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken and Silesian is protected by the exculpatory clauses of the Act from any claim from its alien stockholders.

Judgment affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

The Circuit Court of Appeals said: "Thus, it can be argued with much force that, unless some provision can be found by which he may secure compensation, § 5(b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection (2) would be valid." 156 F. 2d 793, 797.